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REPORTS
OF
CASES AT LAW AND IN CHANCERY
ARGUED AND DETERMINED IN THE
SUPREME COURT OF ILLINOIS.

VOLUME 165.

**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN JANUARY,
MARCH AND APRIL, 1897, AND CASES IN WHICH REHEAR-
INGS WERE DENIED AT THE MARCH TERM, 1897,
WITH PROCEEDINGS HAD IN THE SUPREME COURT IN MEMORY OF
LYMAN TRUMBULL.**

ISAAC NEWTON PHILLIPS,
REPORTER.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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IN MEMORIAM.

LYMAN TRUMBULL.

PROCEEDINGS HAD IN THE SUPREME COURT OF ILLINOIS, HELD AT
SPRINGFIELD, ON WEDNESDAY, JANUARY 6, 1897, BEING
OF THE JANUARY TERM OF THAT YEAR.

The Hon. LYMAN TRUMBULL, formerly one of the Justices of this court, died at his home in Chicago on June 25, 1896. At the January Term, 1897, of the court, held at Springfield, on the sixth day of January the following proceedings were had:

Hon. JOHN M. PALMER, addressing the court, said:

May it please the court—I am charged by the Chicago Bar Association with the duty of presenting to this court the memorial of that association relating to the life and services of Hon. LYMAN TRUMBULL, who died in the city of Chicago on the 25th day of June, 1896.

I can add but little to the brief sketch furnished by the bar association of the life and public services of our late distinguished brother. Perhaps I may be allowed to add that I first met LYMAN TRUMBULL in December, 1839, and at that meeting a foundation was laid for a friendship between us that lasted as long as he lived,—a recollection of which will be cherished by me during the remaining years of my life.

The resolute purity of Mr. TRUMBULL'S private life repelled the approach of all the seductive forms of corruption, and he was at the same time above the heated clamors of men, some of whom, no doubt, were impelled to action by the most patriotic impulses.

His vote for the acquittal of Andrew Johnson, the President of the United States, who was impeached by the House of Representatives and tried by the Senate, was an exhibition, at once, of the noble integrity and independence of his public life. His friends, who were anxious for his fame and were fully aware of the influence his conduct would have upon his own personal future, urged him to vote for the conviction of the President. In reply to a letter written by one of these friends he said: "I am a Senator and a judge. The President is not guilty in manner and form as charged in any one of the articles of impeachment. I must so find and must so vote, without regard to consequences." We know now that if President Johnson had been impeached by the Senate and removed from office the constitutional distribution of the powers of the government would have been disturbed, and the Congress would have become the supreme power in the republic. I do not believe that Mr. TRUMBULL, on that occasion, was influenced by the consideration I have mentioned. He was, as he described himself, a "Senator and a judge." He did not believe, from the evidence, that the President was guilty as charged in the articles of impeachment, and so found and so voted.

Mr. TRUMBULL was at the head of the judiciary committee of the Senate during a great portion of the civil war. He watched the progress of that great contest with an indescribable interest. His mind was logical, but not suggestive or theoretical. He accepted the facts of the situation as they occurred, and sought to provide for them by apt constitutional legislation. He favored the amendments to the constitution which the war made necessary, and prepared the Civil Rights bill, which declared all persons born within the limits of the United States to be citizens, thereby avoiding an embarrassing enumeration of the rights to be conferred by Congress or the States upon the people made free by the action of the national government.

Mr. TRUMBULL, as a lawyer, loved the common law. He was fond of its accurate definitions, its comprehensive scope, its flexibility and adaptedness to all social and business changes. Like the Great Father of the common law he held it to be the perfection of reason. But I doubt whether he fully understood and was duly impressed with that other branch of law—that mysterious science called "Equity." He could not fully comprehend how it was that the courts of equity could take jurisdiction and assume

the management of hundreds, if not thousands, of miles of railroad, and become the employer of many thousands of persons, and enforce a quasi-criminal jurisdiction, and punish all who might dispute their authority by proceedings as for contempt. His latest argument in the Supreme Court of the United States was addressed to this subject. One of the judges of that distinguished tribunal spoke of it as one of "signal ability." He was then over eighty-one years of age.

It is proper that I should speak, in conclusion, of Mr. TRUMBULL in the relations of husband, father and friend. As a husband he was devoted; as a father, liberal and generous. He bore his large share of misfortunes and bereavements which grow out of these relations, with fortitude, while his friendships were confiding and unchangeable.

I now present the memorial of the bar association of Chicago, and ask that it be spread upon the records of this court.

Memorial of LYMAN TRUMBULL, adopted by the Chicago Bar Association :

"On the 25th of June last, Hon. LYMAN TRUMBULL, who had for nearly sixty years been a distinguished member of the bar of Illinois, died at his home in the city of Chicago. He was born in Colchester, Connecticut, on the 12th day of October, 1813, and was within a few months of eighty-three years of age at the time of his death. He received a good academic education at Bacon Academy, in his native town, and when about twenty years old went to Greenville, in the State of Georgia, where he became principal of an academy and taught acceptably for about four years, and also devoted his spare time to the study of the law, and in the spring of 1837 was admitted to the bar of that State. Soon after that event he removed to Belleville, St. Clair county, in this State, and entered upon the practice of his chosen profession there. He was successful from the first, and soon acquired a high reputation for learning and legal ability in that part of the State. In 1840 he was elected a member of the House of Representatives of the Illinois legislature, where, in a brief term of service, he made his mark as an able debater and legislator. In February, 1841, he was appointed Secretary of State, and held that office until March, 1843, when he retired and resumed his practice at Belleville, and soon took rank with the ablest lawyers of our State. In Septem-

ber, 1848, he was elected one of the justices of the Supreme Court of this State under the new constitution, which went into effect that year. His term of service in that office expired in 1852 and he was re-elected that year, but resigned on the 4th of July, 1853, and returned to the bar. At the general election of 1854 he was elected a member of Congress, but never took his seat under this election, as in the ensuing winter he was elected to the United States Senate, —and to this position he was afterwards twice re-elected, making a continuous service of eighteen years in this high and responsible office, which included the most critical period in the history of this nation.

“A mere enumeration of the useful and exalted places of public trust successively filled by Judge TRUMBULL is of itself sufficient testimony to his worth and ability. As lawyer, jurist and statesman, the history of his services to his country is written upon the records of our courts, State and nation. As a lawyer he had great natural aptitude for the work of his profession,—was an industrious, conscientious, earnest and persistent advocate of his client’s cause, but always the courteous gentleman; and the reported decisions of our Supreme Court while he was a member of it furnish abundant evidence of his wide research and learning, and his broad powers of reasoning in the application of the principles of the law to the cases which came before the court for adjudication.

“While we are here dealing with his memory mainly as a lawyer and judge, yet it is also fitting that we say, few, if any, of our statesmen who were in public life contemporary with Judge TRUMBULL showed more profound knowledge of the underlying principles of our government, or more courage or wisdom in their application and preservation in that revolutionary period, than he, and he will ever be esteemed one of the most able, independent and fearless in that galaxy of great statesmen of his time.

“In his private and public life he was ever inflexibly honest and ever true to his own convictions of right. He was a useful citizen and neighbor, a kind, sympathetic and helpful friend, an earnest, trustful, Christian gentleman. But few men have identified their names and career more indelibly with the history of this country than he, and the precious heritage of his fame belongs to us, the members of his profession, as well as to his immediate family. His life of success and usefulness will be a lesson to this and future generations of young men.”

Mr. CHIEF JUSTICE MAGRUDER, on behalf of the court, responded:

The court recognizes the truth and justice of the tribute paid by counsel to the life, character and services of Judge TRUMBULL. The legacy of honor which LYMAN TRUMBULL has left to Illinois belongs, in part, to this tribunal, of which he was at one time a valued and respected member. He first became a justice of the Supreme Court of Illinois in September, 1848, and continued to act as such until July, 1853. At the latter date he resigned the seat, which he had filled for nearly five years with credit to himself and with advantage to the jurisprudence of the State. The opinions pronounced by him during his term of service may be found in the five volumes of the Illinois Reports from 5 Gilman to 14 Illinois, inclusive. No lawyer can read them without being satisfied that the writer of them was an able, industrious and fair-minded judge. All his judicial utterances, as recorded in these volumes, are characterized by clearness of expression, accuracy of statement and strength of reasoning. They breathe a spirit of reverence for the standard authorities of the law, and abound in copious references to those authorities. The last opinion of Judge TRUMBULL, delivered at the June term, 1853, deprecates the necessity of overruling a former decision deemed to be erroneous, and recognizes the value, in a well-ordered judicial system, of the doctrine that what has been decided should stand. His reasoning in some of the cases is prophetic of the statesmanship which characterized his subsequent course in the national legislature. In his first opinion he discusses the subject of attaching the property of debtors about to remove their property from the State, and considers the probable effect of such action, if taken without reference to any injury done to creditors, in embarrassing "the trade and commerce of the country." Shortly thereafter he had occasion to comment upon the extent to which the common law in regard to enclosures should prevail in this State, and strongly insisted upon the idea that the common law should only be enforced so far as it was "applicable to the habits and condition of our society and in harmony with the genius, spirit and objects of our institutions." The decisions of the court, when he spoke as its organ, are to-day regarded as among the most reliable of its established precedents. His associates upon the bench were Samuel H. Treat and John D. Caton, the

court then consisting of only three members. The commonwealth was fortunate in having such able and clear-headed men to settle the many important legal questions which arose during the early years of its history under the constitution of 1848.

Judge TRUMBULL was pre-eminently a self-made man, and came to the performance of his duties upon the bench at the early age of thirty-five years, after a careful preparation which had been secured by his own exertions. His labors as teacher in Connecticut from the age of sixteen to that of twenty years, and as teacher and law student in Georgia from the age of twenty to that of twenty-four years; his long journey on horseback from Georgia to Illinois in 1837, and permanent settlement here at the age of twenty-four years; his practice for eleven years at the bar of Illinois, with brief periods of service during that time as a member of the State legislature and as Secretary of State,—all these experiences had an important influence in that development of character and intellect which made him an ornament to the judiciary of his adopted State. His successful career, evolved out of such conditions, is an inspiration to every struggling young man who has nothing but his own efforts to rely upon for promotion in life.

Soon after his retirement from the Supreme bench of this State Judge TRUMBULL became a representative of Illinois in the Senate of the United States. Nor can it be doubted that quiet study of the questions presented to him in the former position operated as a fitting preparation for the weighty problems which confronted him in the latter. His services to the nation at large as a participant in the making of law were no less distinguished than his services here as an expounder of law. His career as Senator during the eighteen years from 1855 to 1873 is well known and is a part of the history of the country.

During the trying period of the civil war, and the stormy years which followed it, his position as chairman of the judiciary committee of the Senate made him a conspicuous figure, and gave him many opportunities to aid the government, by appropriate legislation, in its efforts to save the Union of the States. These opportunities he made use of with ability, patriotism and courage.

The emancipation proclamation, issued by the executive as a war measure and acted upon by the armed forces then in the field, gave freedom to millions of slaves; but the abolition of slavery may not have been permanently secured in the absence of legal

enactment. It was necessary to the continued protection of the liberty which was won by the sword, that its recognition should be embodied in the fundamental law of the republic. The thirteenth amendment to the Federal constitution, which provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction, and that Congress shall have power to enforce the provision by appropriate legislation, was written by Judge TRUMBULL, and his influence was exerted in favor of its submission for ratification by the requisite number of States. This constitutional dedication of the Federal government to the principle of individual freedom is so grand a monument to the fame of its author, that his public life needs no other eulogy than the simple mention of it.

Upon his return to the practice of the law he met with a large measure of success. Most of the present members of this court have listened to his arguments with pleasure and instruction. The extent and character of the legal business which he drew to himself during more than twenty years of his later life are a sufficient refutation of the idea, so often advanced, that long service upon the bench or in the halls of legislation disqualifies a lawyer for the further practice of his profession. In all the relations which Judge TRUMBULL bore to others,—in the domestic circle, in social intercourse or in matters of business,—he was true to his obligations and faithful to every trust reposed in him. His final sickness was contracted while engaged in performing a last tribute of respect at the grave of one of his honored predecessors upon the Supreme bench of the State.

Within less than two years last past, four men, who in their lives had done good service as members of this court, have gone to their final rest,—Bailey, Caton, Koerner and TRUMBULL. Their passing away sadly reminds us of our own mortality, and that we live in the grateful memory of those who come after us only because of good deeds done or good thoughts expressed.

Let the resolutions which have been submitted, and the proceedings accompanying their presentation, be spread upon the records of the court. As a further token of respect for the deceased an adjournment is now ordered.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

COMMISSIONERS OF HIGHWAYS OF THE TOWN OF GOSHEN

v.

WILLIAM A. JACKSON.

Filed at Ottawa January 19, 1897.

165	17
191	540
165	17
112a	646

1. HIGHWAYS—*police magistrate may entertain proceedings to assess damages for opening road.* The jurisdiction of police magistrates and justices of the peace being uniform, the former may entertain proceedings to assess damages for opening a road, although section 41 of the Road act (Laws of 1883, p. 148,) designates the latter as the proper tribunal.

2. SAME—*final meeting of supervisors need not be held in the town where the road is located.* A final meeting of supervisors at which a road is ordered to be established is not invalid because held at a point outside the town in which the road is located.

3. SAME—*no demand on commissioners to open road and levy tax necessary before petitioning for mandamus.* The duty of highway commissioners to open a road and levy a tax therefor, as ordered by the supervisors, is public, resting upon them by virtue of their office, and no demand upon them is necessary after their default, before the filing of a petition for mandamus.

4. SAME—*land owners awarded damages need not part with land before receiving compensation.* Section 10 of the Eminent Domain act, (Rev. Stat. 1874, p. 477,) providing that petitioners may enter upon lands and the use of the same upon payment of the full compensation awarded, is to be construed *in pari materia* with the Road act.

5. *SAME*—*awarding damages on opening road does not create a township indebtedness.* It is no defense to *mandamus* to compel highway commissioners to open a road and levy a tax therefor, that the township indebtedness already exceeds the constitutional limit, as the awarding of damages to land owners for opening a road does not create an indebtedness.

6. *SAME*—*questions of necessity for road and burden on tax-payers not open in Supreme Court.* Whether the payment of damages for opening a road will be a great burden on tax-payers, or whether the public interest does not require a road, are questions upon which, under section 48 of the Road act, the determination of the highway commissioners, or, upon appeal, of the supervisors, is final.

7. *MANDAMUS*—*that prayer in mandamus petition is too broad is no objection on appeal.* An objection that the prayer in a petition for *mandamus* is too broad cannot be entertained on appeal, as a court is not obliged to grant the prayer in its entirety, but only so much thereof as the petitioner is entitled to.

8. *SAME*—*no objection to writ that the order of its commands is reversed.* A writ of *mandamus* commanding highway commissioners "to proceed with all lawful diligence to open and work such road for public travel and levy all necessary and lawful taxes to pay damages to land owners," etc., is not objectionable because the command to open the road comes before the command to levy the tax.

Comrs. of Highways v. Jackson, 61 Ill. App. 381, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Stark county; the Hon. N. E. WORTHINGTON, Judge, presiding.

B. F. THOMPSON, for appellants.

VICTOR G. FULLER, and ALLEN P. MILLER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The relator, William A. Jackson, and others, presented their petition to the highway commissioners of the town of Gosben for laying out a new road. The commissioners refused to grant the prayer of the petitioners, and Jackson appealed from their decision to three supervisors of the county. The supervisors granted the petition,

had the damages assessed, and ordered the road laid out by their final order, filed March 16, 1894. At their next semi-annual meeting, on the first Tuesday in September, 1894, the commissioners failed to levy any tax for the damages awarded for laying out this road, and in December, 1894, a written demand was served on them, requiring them "to proceed with all lawful diligence to open said road for public travel, and to levy all necessary taxes or issue bonds to pay the damages assessed to land owners by reason of laying out said road, and to do all acts and things necessary and lawful to be done for the speedy opening of such road." To this demand the commissioners paid no attention, and the relator, Jackson, filed his petition for *mandamus* in the Stark circuit court on December 13, 1894, to compel them to open and work said road and to levy necessary and lawful taxes for the payment of damages to land owners. The court awarded the writ, commanding said commissioners "to proceed with all lawful diligence to open and work such road for public travel, and levy all necessary and lawful taxes to pay damages to land owners, and to do all acts and things necessary and lawful to be done for the speedy opening of said road to public travel." From the judgment of the circuit court an appeal was taken to the Appellate Court for the Second District, which affirmed the decision of the lower court, and from this judgment of affirmance a further appeal was prosecuted to this court.

By stipulation of the parties it was conceded that the allegations of fact in the petition and answer were true, and that the cause should be determined upon the questions of the sufficiency of the demand made upon the commissioners, the jurisdiction of the police magistrate before whom the damages were assessed, the legality of the final meeting of the supervisors on appeal, which was held outside of the town of Goshen, and whether a tax could legally be levied to pay damages while the town was indebted to the constitutional limit.

First—The petition for an appeal was filed with, and the proceedings for the assessment of damages by a jury were had before, a police magistrate of the village of Toulon, which is the county seat of Stark county, and it was contended by the appellants that because the statute provided that such proceedings shall be taken before "some justice of the peace of the county," (Laws of 1883, sec. 41, p. 148,) a police magistrate had no jurisdiction. This contention is without merit. In the statute (Rev. Stat. 1874, chap. 24, art. 11, sec. 15,) provision is made for the election of police magistrates in villages, who shall "have the same jurisdiction as other justices of the peace;" and section 21, article 6, of the constitution, provides that "the jurisdiction of justices of the peace and police magistrates shall be uniform." This court has held in *Welsh's case*, 17 Ill. 161, that calling officers having the powers of justices of the peace, police magistrates, does not render them any less justices of the peace. (*Herkelrath v. Stookey*, 58 Ill. 21.) And in *Brown v. Jerome*, 102 Ill. 371, it was held that the constitution of 1870 "did not deprive them of any powers possessed generally by justices of the peace."

Second—The first meeting of the supervisors was held in the town of Goshen, but was adjourned to the court house in Toulon, about forty rods from the Goshen line, "because there was no convenient place for said hearing at the place appointed," but no objection was made to the legality of said adjourned meeting. The final meeting of the supervisors at which the road was ordered laid out was also held at the court house in Toulon, and the commissioners now contend that this meeting was illegal, and its proceedings null and void, because not held within the town of Goshen. The Road act of 1883 (sec. 60) provides that the justice of the peace "shall fix in such summons upon a time and place, near the road in question, when such appeal will be heard" by the supervisors. It cannot be successfully contended that forty rods is an

unreasonable distance from the road in question, and the statute does not require the place to be within the town, but "near the road in question." The Road act of 1879 (sec. 99) provides that the "supervisors shall fix upon a time and place when said appeal will be heard by them, which place shall be in the town where the road is located." (Laws of 1879, p. 279.) The present statute omits the latter clause, and gives the justice of the peace the power to fix time and place. This omission was evidently done with a purpose, and we are not at liberty to re-insert it in the statute.

But it is contended that the supervisors, on appeal, have no greater powers than the highway commissioners, and that for the purposes of said appeal they act as town officers, and not as county officers. The commissioners are directed in section 33 of the act of 1883 to "fix upon a time when and place where they will meet to examine the route of said road," and in section 47, to hold a meeting to finally determine the matter, without specifying anything as to the place of the meeting. In case damages are to be assessed, they are directed to present a certificate to "some justice of the peace of the county," who shall specify "a certain place" for the trial, (sec. 41,) without specifying that the justice or the place must be of the town in which the road is located. There is nothing in these provisions requiring action to be taken within the town, and even if it be conceded that the commissioners must meet in their own town, (on which we express no opinion,) it does not follow that the supervisors are thus restricted. The justice of the peace fixes their first meeting place, which shall be "near the road in question." Suppose the case was such that it could be finally settled at one meeting of the supervisors, as in the case of vacating a road, where the supervisors affirmed the decision of the commissioners, a meeting "near the road in question" would unquestionably be sufficient. We do not see any good reason why, when more meetings than

one are required, any subsequent meetings would not be legal if held "near the road in question."

Third—Was the demand made in apt time, and was there any demand necessary? Demand could not be made before breach of duty. Did any breach of duty occur, and if so, when? Section 15 of the act of 1883 provides: "When damages have been agreed upon, allowed or awarded for laying out * * * roads, * * * the amounts of such damages, not to exceed for any one year twenty cents on each \$100 of the taxable property of the town, shall be included in the first succeeding tax levy provided for in section 13 of this act, and be in addition to the levy for roads and bridges." Section 17 provides: "Whenever damages have been allowed for roads or ditches, the commissioners may draw orders on their treasurer, payable only out of the tax to be levied for such roads or ditches, when the money shall be collected or received, to be given to persons damaged." It is clearly the duty of the commissioners, "when damages have been agreed upon, allowed or awarded for laying out roads," to include "the amounts of such damages, not to exceed for any one year twenty cents on each \$100 of the taxable property of the town * * * in the first succeeding tax levy provided for in section 13." That section provides that such tax levy shall be made at the meeting of the commissioners immediately preceding the annual meeting of the county board. This meeting of the county board is to be held the second Tuesday of September. (Rev. Stat. 1874, chap. 34, sec. 49.) The semi-annual meeting of the commissioners shall be on the same day of meeting of the board of town auditors, (sec. 13, *supra*,) and the town auditors hold their semi-annual meeting on the Tuesday next preceding the annual meeting of the county board. (Rev. Stat. 1874, chap. 139, art. 13, sec. 3.) There can be but one tax levy in a year. (*St. Louis Nat. Stock Yards v. People*, 127 Ill. 22.) The commissioners failing to make any levy for the payment of the damages

for the road in controversy on the first Tuesday in September, 1894, they were thereafter in default. The relator could not have made a legal demand on them before, as he could not know that they would disregard the plain mandate of the law. (*City of Cairo v. Campbell*, 116 Ill. 305.) But a demand was not necessary. "If the duty, the performance of which is sought to be enforced, is a public duty, resting upon respondents by virtue of their office, it is well settled that no such demand and refusal are necessary." High on Ex. Legal Rem. sec. 41, cited in *People v. Board of Education*, 127 Ill. 613; *People v. Williams*, 145 id. 573.

Fourth—It is contended by the appellants that the town of Goshen is indebted beyond the constitutional limit, and that the court has no power to compel it to create an indebtedness contrary to law. The commissioners have no power to draw any orders for the payment of these damages unless there is a fund on hand for their payment or a tax levy has been made for that purpose. (Sec. 17, *supra*; *Comrs. of Highways v. Newell*, 80 Ill. 587; *Brauns v. Town of Peoria*, 82 id. 11; *Sullivan v. Comrs. of Highways*, 114 Ill. 262.) In *City of Springfield v. Edwards*, 84 Ill. 626, where the question of municipal indebtedness beyond the constitutional limit is fully considered, the court say (p. 633): "In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to, with these qualifications: First, the tax appropriated must, at the time, be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made and the

warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation, leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased." This opinion is cited in the well-considered case of *Law v. People*, 87 Ill. 385, and fully sustained in *Fuller v. Heath*, 89 id. 296.

The law provides how money to pay for such damages on account of laying out new roads shall be raised, and further expressly limits the commissioners, in drawing orders for the payment thereof, to orders "payable only out of the tax to be levied for such roads, when the money shall be collected or received, to be given to persons damaged." The very words of the statute seem to be framed to meet the decision in *City of Springfield v. Edwards*, *supra*. The awarding of damages for laying out a new road is not the creation of any debt, either present or contingent, but is in the nature of a sale for cash. The property owners to whom the damages are to be paid are not obliged to part with their land until they have received their damages, and the statute expressly provides, (Eminent Domain act, sec. 10,) that the petitioner may "enter upon such property, and the use of the same, upon payment of full compensation, as ascertained as aforesaid,"—which statute is to be construed *in pari materia* with the Road and Bridge act. (*Hyslop v. Finch*, 99 Ill. 174.) Whenever the commissioners tender the cash, or its equivalent, to the land owners, then, and not till then, will they be in a position to take possession of the road. Can it be said that the land owners could sue the town before possession taken? In *City of Chicago v. Barbican*, 80 Ill. 482, the court say (p. 485): "The rights of the parties are correlative and have a reciprocal relation, the existence of the one depending on the existence of the other. When the party seeking condemnation acquires a vested right in the property, the owner has a vested right in the compensation; but since no vested

right can be acquired in the property, without the owner's consent, until compensation shall be paid, it must follow there can be no vested right in the compensation until after the amount is paid." We cannot regard the proceeding as the creation of a debt.

Fifth—Objection is made to the language of the writ of *mandamus*, as awarded; also to the prayer of the petition, as being too broad. The court is not obliged to grant the prayer in its entirety, but only so much as the relator is shown to be entitled to. The objection to the language of the writ as awarded is, that it commands the commissioners to open and work said highway for public travel before it commands them to levy the tax to pay the damages assessed, and to the insertion of the word "work" in the writ. We apprehend that the order of the clauses in the writ is immaterial, inasmuch as it commands them "to proceed with all lawful diligence," etc., and "to do all acts and things necessary and lawful to be done for the speedy opening of said road for public travel." The insertion of the word "work" is immaterial, and does not deprive the commissioners of their discretion as to the manner of placing the road in a fit condition for travel.

It is finally contended by the appellants that the payment of these damages will be a great burden on the taxpayers of the town, and that no public interest requires the road in controversy. These are not questions for us to decide. The statute vests this power in the commissioners, and in the supervisors on appeal. (Laws of 1883, sec. 48, p. 149.)

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HENRY LLEWELLIN

v.

CAROLINE M. DINGEE, Admx. *et al.**Filed at Ottawa January 19, 1897.*

1. **BURNT RECORDS**—*proof of contents of records must be made.* A petition to restore the files and records of a chancery proceeding which were destroyed by fire is properly dismissed where no proof is made of the contents of such files and records.

2. **EVIDENCE**—*unverified copies of papers do not prove contents.* Alleged copies of destroyed files prepared by petitioner's solicitor, and attached to a former petition for their restoration, which have never been admitted by the defendants nor decided by the court to be correct copies, are no evidence of the contents of files.

3. **SAME**—*attorney's memoranda not competent to prove contents of destroyed bill.* Mere entries in a "docket" kept by the attorneys in a cause, showing the parties and containing memoranda of the nature of a destroyed bill, are not competent, in the absence of any preliminary proof, to show the contents of such bill.

4. **SAME**—*a sworn petition not admitted does not prove itself.* An averment in a petition that certain exhibits attached are substantial copies of destroyed files, which averment is neither admitted nor denied by the answer, which calls for proof thereof, must, under our chancery practice, be proved, notwithstanding the petition was verified by oath.

Llewellyn v. Dingee, 64 Ill. App. 563, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

BULKLEY, GRAY & MORE, and ALFRED MOORE, for appellant:

Every court of general jurisdiction has inherent power to supply its own lost or defaced records. *Goetz v. Koehler*, 20 Ill. App. 234; *Douglas v. Yallop*, 2 Burr. 722; *Jackson v. Hammond*, 1 Caines' Cases, 496; *Deshong v. Cain*, 1 Duv. 309; *McLendon v. Jones*, 8 Ala. 298; *Doswell v. Stewart*, 11 id. 629; *Adkinson v. Keel*, 25 id. 551; *Pruitt v. Pruitt*, 43 id. 73; *Pierce*

v. *Thackery*, 13 Fla. 574; *Fisher v. Sievres*, 65 Ill. 99; *Freeman on Judgments*, sec. 89.

The papers of a case, when filed, under our statute become a part of the record as fully as if copied into the record book of the court. *Stevison v. Earnest*, 80 Ill. 513, and cases cited.

The destruction of the record by fire has no effect upon the constructive notice existing by virtue of such record. *Bank v. Taylor*, 131 Ill. 376; *Shannon v. Hall*, 72 id. 354; *Curyea v. Berry*, 84 id. 600.

It is a general rule in pleading that a party confesses all such traversable allegations on the opposite side as he does not traverse. *Dana v. Bryant*, 1 Gilm. 104; *Pearl v. Wellman*, 3 id. 311; *Simmons v. Jenkins*, 76 Ill. 479.

A record, when lost or destroyed, may be proven by secondary evidence. *Gage v. Schroeder*, 73 Ill. 44.

When the highest evidence cannot be had then resort may be had to the next highest or secondary evidence. *Ellis v. Huff*, 29 Ill. 449; *Cornett v. Williams*, 20 Wall. 226; *Hedrick v. Hughes*, 15 id. 123; *Renner v. Bank*, 9 Wheat. 581; *Beveridge v. Chetlain*, 1 Ill. App. 231.

JESSE A. & HENRY R. BALDWIN, and KNIGHT & BROWN,
for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A decree for partition of certain lands in Cook county was entered by the circuit court of that county in 1861, and appellant filed his bill April 22, 1871, for the purpose of setting aside that decree, but the files and records of the latter suit were destroyed by fire October 9, 1871. He filed his petition in this case April 21, 1888, asking the court to restore said lost and destroyed files and records. He alleged that his bill filed in 1871 was answered and he filed his replication to such answer; that after the destruction of the files the suit was dismissed by the

circuit court April 8, 1873, by a general order; that on June 14, 1880, he filed a petition, similar to the present one, to restore the destroyed files, and that such petition was pending in said court until July 12, 1887, when it was dismissed for want of prosecution. He annexed to his petition what he alleged to be substantial copies of the files which he asked to have restored, and the petition was verified by his oath. The appellees answered the petition, admitting that the suit begun in 1871, in which the files were destroyed, was dismissed in 1873, and averred that petitioner had no right to have the files restored, because he had no further interest in the cause; that the former petition for restoration, begun June 14, 1880, was dismissed when reached for trial July 12, 1887, on the regular trial call; that afterward petitioner filed a motion to set aside the order of dismissal, which was heard and denied, and that the decree of dismissal so entered was a bar to the present suit. On a hearing of the petition it was dismissed for want of equity, and the decree dismissing it has been affirmed by the Appellate Court.

The parties have argued questions as to the power of the court to dismiss the bill filed in 1871 by the general order of April 8, 1873, applicable to all causes pending before the fire and not redocketed; as to *laches* and limitations, and as to the effect of the dismissal of the former petition for want of prosecution as a bar to a renewal of the application; but none of those questions will be considered, for the reason that petitioner failed to make any proof of the contents of the files and records which he asked to have restored. The solicitors, Eldridge & Tourtelotte, who acted for complainant in the suit where the files were destroyed, Spafford & McDaid, solicitors for the defendants in that suit, and every person employed by either of the said firms, and the principal defendants, were all dead. There seemed to be no one living who knew what was contained in the original files.

It was attempted to prove that the copies attached to the petition were true copies of the destroyed files by introducing alleged copies made by petitioner's solicitors in 1880. It appears that in the former proceeding, begun in 1880, to restore the files, an order was entered allowing petitioner to file copies of the bill, answer and replication, and he filed what he claimed were such copies. They were prepared by his solicitor, and were never admitted by the defendants nor decided by the court to be copies. Petitioner attempted to prove some admission of the late H. O. McDaid, solicitor for defendants at that time, that the alleged copies were true and correct. The testimony was, that McDaid agreed to "O. K." correct copies; that these alleged copies were given to him; that petitioner's solicitor kept calling on him for that purpose, but that he never succeeded in getting McDaid to "O. K." them. The testimony did not show any admission that the copies were correct, but rather proved that such an admission could not be obtained. Of course, the fact that petitioner or his solicitor asserted in 1880 that certain papers were copies of the original pleadings had no tendency to establish the truth of the same claim or assertion when renewed in 1888.

Petitioner also offered in evidence the entries in a book called a "docket," kept by his solicitors, Eldridge & Tourtelotte, giving the names of the parties and their solicitors and memoranda of the nature of the bill in which the files were destroyed. This evidence was rejected by the court, and that ruling is complained of. If the evidence had been competent it would not have justified a decree, since there would still have been an entire absence of proof touching any of the pleadings except the bill. But the entries were properly rejected. There was no preliminary proof that the entries were contemporaneous with the services or employment of the solicitors as a part of the transaction, or even that the firm usually made such entries in connection with the transaction re-

corded. The solicitor in whose handwriting the entries were made was living up to within a few months of the hearing of this case, and they might have been made, for aught that appears, long after the transaction, and if such evidence could be admitted in any case it was properly rejected here.

The petitioner averred that the exhibits were substantial copies, and the petition was verified by his oath. The defendants answered that they did not know whether the exhibits were copies or not, and would neither admit nor deny the averment, but called for proof. In that state of the case it is insisted that the verified petition was sufficient proof. But that is not the rule. By the chancery practice, by which this proceeding was governed, an averment which is neither admitted nor denied must be proved. (*De Wolf v. Long*, 2 Gilm. 679; *Wilson v. Kinney*, 14 Ill. 27; *Trenchard v. Warner*, 18 id. 142; *Kitchell v. Burgwin*, 21 id. 40; *Dooley v. Stipp*, 26 id. 86; *Nelson v. Pinegar*, 30 id. 473.) It was incumbent upon petitioner to prove that his exhibits were substantial copies of the destroyed record, and this he failed to do.

The court admitted, against the objection of appellant, the testimony of a real estate dealer that the property was included in the village of Wilmette; that between 1873, when the bill was dismissed, and 1888, a great deal of the property was sold, and that at least one hundred and twenty-five houses had been built upon the land, almost wholly by different owners. This evidence was offered on the question of *laches*, to show that during the long delay of petitioner the rights of numerous innocent third parties, who would be injured by permitting him to maintain his petition, had intervened. As the petition was not proved, the questions whether *laches* was a defense and whether the evidence was relevant are of no consequence.

The judgment will be affirmed. *Judgment affirmed.*

EMMA RIMMER

v.

THE O'BRIEN-GREEN COMPANY.

Filed at Ottawa January 19, 1897.

APPEALS AND ERRORS—*Appellate Court's judgment is final in mechanic's lien suits involving less than \$1000.* The rule that in proceedings to foreclose a mortgage where the amount involved is less than \$1000 the judgment of the Appellate Court is final, in the absence of a certificate of importance, applies to proceedings to enforce a mechanic's lien.

Rimmer v. O'Brien-Green Co. 64 Ill. App. 104, dismissed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

FARSON & GREENFIELD, for appellant.

LEVI SPRAGUE, for appellee.

MR. JUSTICE CRAIG delivered the opinion of the court:

This was a proceeding commenced in the Superior Court of Cook county to enforce a mechanic's lien. Upon a hearing in the Superior Court the petitioner obtained a decree for \$417.90, and interest from January 1, 1893. To reverse that decree Emma Rimmer appealed to the Appellate Court, where the judgment of the Superior Court was affirmed as to the \$417.90 but reversed as to the allowance of interest, and she has appealed to this court.

This being a proceeding to collect a debt, and the amount involved being less than \$1000, the judgment of the Appellate Court was final, and no appeal will lie from that judgment to this court unless the Appellate Court has granted a certificate of importance as provided for in the statute, which was not done. We have held

in a number of cases that on a bill to foreclose a mortgage, where the amount involved is less than \$1000, the judgment of the Appellate Court is final. (*Akin v. Cassidy*, 105 Ill. 22; *Sedgwick v. Johnson*, 107 id. 385.) The same principle governing these cases in regard to an appeal must apply to a proceeding to enforce a mechanic's lien.

The appeal will be dismissed.

Appeal dismissed.

THE JOLIET NATIONAL BANK

v.

JAMES L. O'DONNELL, Assignee.

Filed at Ottawa January 19, 1897.

1. VOLUNTARY ASSIGNMENTS—*purpose of statute requiring creditors to present claims within three months.* The purpose of section 10 of the Voluntary Assignment act, (Laws of 1877, p. 116,) requiring creditors to file their claims with the assignee within three months after his notice, is to hasten the settlement of the estate rather than to bar *bona fide* claims not presented within the letter of the law.

2. SAME—*creditor need not himself make oath to claim.* A claim filed by a creditor with the assignee and duly sworn to by him, which includes the claim of another creditor, is a sufficient presentation of the latter claim under section 2 of the Voluntary Assignment act, which requires claims to be presented under oath or affirmation.

3. SAME—*creditor's name need not appear if claim is otherwise identified.* The fact that in a claim filed by a creditor including the claim of another creditor the latter's name does not appear will not affect the sufficiency of its presentation, where the assignee and all parties concerned were fully aware of such creditor's identity and his ownership of the claim.

4. SUBROGATION—*of creditor to rights of another—voluntary assignment.* Where a party includes conditionally in his own claim against an insolvent assigned estate the claim of another creditor, and files it with the assignee within the time allowed by law, such other creditor, on failing to file his separate claim in time, will be subrogated, as to his own claim, to the rights of the first party, acquired by presenting the same in time.

MAGRUDER, C. J., and CARTWRIGHT, J., dissenting.

Joliet Nat. Bank v. O'Donnell, 65 Ill. App. 543, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the County Court of Will county; the Hon. A. O. MARSHALL, Judge, presiding.

This is an appeal by the Joliet National Bank from a judgment of the Appellate Court affirming an order of the county court of Will county denying appellant's petition, in which it prayed that it might be allowed to *pro rate* with the creditors of Henry Fish & Sons in the assets of the firm in the hands of the assignee for distribution.

Henry Fish & Sons, bankers, doing business at Joliet, Illinois, under the name of the Stone City Bank, failed and made an assignment on the 30th day of November, 1892, to James L. O'Donnell, assignee. O'Donnell qualified as such assignee on December 2, 1892, and is still acting as such. The appellant, also doing a banking business at Joliet, at about an hour or two before the Fish bank closed its doors and made the assignment to O'Donnell, paid to the Fish bank the sum of \$4200 in money, receiving therefor a draft or bill of exchange drawn by said Fish bank on its New York correspondent, the Third National Bank. This money was in good faith at once taken by the Fish bank, and either immediately paid over to its depositors, who, it seems, had about that time made a "run" on that bank, or was on the same day turned over to the assignee, the appellee, and constitutes a portion of the funds that came to appellee's hands. The draft was at once forwarded by the Joliet National Bank to its New York correspondent, the Hanover National Bank, and by the latter on December 2 presented for payment to the Third National Bank, but payment was refused and the draft went to protest. There is no question, and the record discloses the fact, that when the draft was drawn and at the time of its presentment for payment the Fish bank had more funds to its credit in the Third National Bank

than demanded by the draft. Payment of the draft, however, was refused because the Third National Bank of New York then held Joliet Enterprise Company paper, which had been endorsed by the Fish bank and discounted by the Third National Bank and the proceeds placed to the credit of the Fish bank, in consequence of which the Third National Bank claimed it had the right to set off the Enterprise paper as against the deposit to the credit of the Fish bank. The right of set-off was at once challenged, and suit immediately commenced in the Supreme Court of New York by the Joliet National Bank against the Third National Bank, when it was, afterwards, on motion of the Third National Bank, transferred to United States District Court for the Southern District of New York, where, under the issues presented, the case was decided adversely to the Joliet National Bank. Soon after the case was decided, the Joliet National Bank, on November 26, 1894, presented the claim to the assignee and filed it in the county court, together with a petition for an allowance of the claim. Objection being made to filing the claim, on December 26, 1894, appellant entered a motion for leave to file it. The court held the motion under advisement until April 6, 1895, when leave was granted to file the claim and petition for the allowance thereof. The county court allowed the claim, but ordered that appellant should not share in the dividends until payment in full of all claims which had been presented to the assignee prior to March 15, 1893. At the time the claim was filed in the county court the assignee had made no payment on any claim, nor had any payment been made to any creditor when judgment was entered by the county court in this case.

The following is a copy of the notice published by the assignee in *The Joliet Times* on the 12th day of December, 1892, notifying creditors to present their claims against the insolvent estate:

"Assignee's sale.—The undersigned having been appointed assignee of the property and effects of Henry Fish, Henry M. Fish, George M. Fish and Charles M. Fish, doing business as Henry Fish & Sons, by deed of assignment filed in the office of the county clerk of Will county, public notice is given to all persons having claims against said Henry Fish & Sons to present such claims, under oath or affirmation, within three months after December 15, 1892. Such claims may be presented by filing the same, under oath or affirmation, with the county clerk of Will county at his office.

J. L. O'DONNELL, *Assignee.*

Joliet, Ill., Dec. 12, 1892."

DONAHOE & MCNAUGHTON, for appellant:

Cases in which the chancery jurisdiction of the county court may be invoked to extend the limitation fixed by the statute must be exceptional, and they must present some strong equitable ground for relief. *Kean & Co. v. Lowe*, 147 Ill. 578.

P. C. HALEY, for appellee:

Failure of a creditor of an insolvent estate to exhibit his demand to the assignee within three months from the publication of notice to present claims under section 10 of the act relating to voluntary assignments, will exclude such creditor from participating in the dividends until after payment in full of all claims presented within that time and allowed by the county court. *Kean & Co. v. Lowe*, 147 Ill. 564; *Suppiger v. Seybt*, 23 Ill. App. 470.

A mistake of law, unconnected with a mistake of fact, where there are no indications of fraud, imposition or undue advantage entering into the agreement, will neither constitute an excuse nor defense. *Sibert v. McEvoy*, 15 Ill. 106; *Oswald v. Sproehnle*, 16 Ill. App. 368; *Shafer v. Davis*, 13 Ill. 395.

The mistake of appellant in regard to the laws of the State of New York is not an excuse. *Oswald v. Sproehnle*, 16 Ill. App. 368; *Sibert v. McEvoy*, 15 Ill. 106; *Shafer v. Davis*, 13 id. 395.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It will be observed that the assignee notified creditors, by publication on the 12th day of December, 1892, to present claims against the insolvent estate within three months after December 15, 1892, and as appellant, the Joliet National Bank, failed to make a formal presentation of its claim to the assignee within the time specified, the question arises whether it is absolutely barred from sharing with other creditors who presented their claims, in the assets of the insolvent estate.

Section 2 of the Assignment act, (Hurd's Stat. 159,) provides: "That the assignee or assignees named in such assignment shall forthwith give notice thereof by publication in some newspaper published in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall also send forthwith a notice thereof by mail to each creditor of whom he or they shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims, under oath or affirmation, to him within three months thereafter." Section 10 is as follows: "That any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest; and all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the county court."

If the limitation imposed by this section is absolute, the time is so short that many cases may arise where injustice would be done, provided it is the intention of the law that all creditors shall share equally and that no preference be allowed. Hence in several cases it has been intimated that the equitable powers of the county court may be invoked to extend the limitation imposed

by the letter of the act. In *Suppiger v. Seybt*, 23 Ill. App. 468, the court said: "It may be that cases will arise in which, under the general powers conferred upon county courts by this act, claims not presented within the three months can be allowed to have the same effect as if presented within that time." In *Smith v. Goodman*, 149 Ill. 75, where it was insisted that the claim was not presented within three months, it was held that under the *peculiar* circumstances there was a sufficient presentation. In *Suppiger v. Gruaz*, 137 Ill. 216, it is said (p. 221): "If, therefore, his claim is now barred he will be deprived of sharing with other creditors in the assets of the insolvent, when, at the same time, he has exercised all the diligence which he could exercise to present his claim to the assignees. It is plain that a construction of this character is contrary to the entire scope and spirit of the act, as the act in express terms prohibits a preference among creditors, as will be seen by an examination of section 13."

The purpose, no doubt, of the legislature in fixing so short a period for the presentation of claims was to hasten the settlement of the estate, rather than cut off an honest and *bona fide* claim because it might not be presented within the time prescribed by the letter of the law. It is true, the Joliet National Bank did not itself present the claim to the assignee within the time designated in the notice published, but the claim, represented by the draft which it held, was presented within the time, as we understand the evidence introduced on the hearing before the county court.

It appears that the assignee mailed a notice to the Third National Bank of New York of the time within which claims should be presented. In pursuance of this notice the Third National Bank filed a claim in the alternative form within the three months, as follows:

"Claim filed by the Third National of New York against Henry Fish & Sons, insolvents, as viz.: Harry M. Chapin, cashier, being sworn, states Third National Bank has

a claim against above named insolvents, arising out of two promissory notes, amounting to \$17,362.54, made by the Joliet Enterprise Company to order Henry Fish & Sons, endorsed by Fish & Sons, one dated October 8, 1892, for \$9572.93, payable January 7, 1893, the other for \$7789.61, dated November 19, 1892, payable February 18, 1893, (copies of notes attached); that said notes were discounted by said bank October 10, 1892, and November 22, 1892; that the proceeds of \$9426.14 and \$7671.47, respectively, aggregating \$17,097.61, were placed to the credit of Fish & Sons; that on the date of said assignment a balance of proceeds, viz., \$7118.33, remained in the hands of Third National Bank, which it had a right and did apply toward the payment of said notes by way of equitable set-off, and if said set-off shall be held to be right and allowed, there will remain due the Third National from said insolvents \$9874.09; that a suit to determine said question is now pending in the United States Circuit Court for Southern District of New York, and if it should be held that said Third National had no right of set-off, then the whole amount due said bank from said Fish & Sons on November 30, 1892, would be \$17,200.94, after allowing to them all payments and set-offs and the rebate of interest on said notes not due, of \$161.60."

In connection with the presentation of this claim the following stipulation was made:

"It is hereby stipulated by and between James L. O'Donnell, assignee of Henry Fish & Sons, and the Third National Bank of New York, a creditor, which has proved its claim against said estate, that the amount of the claim of said Third National Bank of New York shall be the sum of nine thousand eight hundred and seventy-four dollars and nine cents, (\$9874.09,) being the amount named in its proof of debt in that behalf, after deducting the credit of seven thousand one hundred and eighteen dollars and thirty-three cents (\$7118.33) named in said proof of debt as a deposit in said bank to the credit of Henry Fish & Sons on the 30th day of November, 1892, and claimed by said bank as a set-off and applied by it towards payment of the notes annexed to said claim, without prejudice,

however, to the right of the said Third National Bank to claim and have allowed the entire amount of the two said promissory notes annexed to said proof of debt without deducting said credit, in case it shall be hereafter finally adjudged that it had no such right to set-off and no right to make the application of said sum of seven thousand one hundred and eighteen dollars and thirty-three cents (\$7118.33) on deposit in said bank to the credit of Henry Fish & Sons on the 30th day of November, 1892, towards payment of said notes dated July 6, 1893.

THIRD NAT. BANK OF NEW YORK,

By E. A. OTIS, *its Attorney.*

J. L. O'DONNELL,

By P. C. HALEY, *Attorney.*

GEORGE S. HOUSE."

The statute did not require the appellant itself to make oath to the claim, but it only required the claim should be presented under oath or affirmation. Here the Third National Bank of New York held on deposit to the credit of Henry Fish & Sons, when they made the assignment, \$7118.33. The draft given by Fish & Sons for \$4200 on this fund represented appellant's claim, which appellant was contesting with the Third National Bank in the courts. The Third National Bank, in order to be safe, included in its claim the identical \$4200 belonging to appellant. Thus appellant's claim was presented under oath to the assignee by the Third National Bank. It is true, the name of appellant does not appear in the claim filed by the Third National Bank. But that does not affect the merits of the controversy, as it was well known by the assignee and all parties concerned that appellant was the party to the suit named in the claim filed, and that the claim arose out of the draft drawn by Fish & Sons in favor of appellant on the fund in the Third National Bank, for the sum of \$4200. The assignee testified: "I should say from the condition of the accounts of the Third National Bank with Henry Fish & Sons, that its offset, whatever it is, in this claim, embraces the Joliet National Bank draft, and embraced the amount in the Joliet National Bank draft. * * * The

claim presented by the Third National Bank to me as assignee included this \$4200."

If the claim of appellant was included in the claim presented by the Third National Bank, as the evidence shows it was, no reason is perceived why the appellant might not properly be subrogated to the rights of the Third National Bank as to the \$4200 embraced in its claim presented to the assignee. This course will mete out justice to all parties concerned, and work no detriment to any one. The claim of the Third National Bank has not been acted upon, but remains with the assignee in the same condition as it was when presented. There is therefore no difficulty in making a disposition of appellant's claim at the same time the claim of the Third National Bank is disposed of. We are therefore of opinion that the claim of the Third National Bank presented to the assignee within the time required by the statute, which included the amount of the draft given by Fish & Sons to appellant, was in fact a presentation of appellant's claim, and, under the equitable rules which should govern the county court in the disposition of claims under the Assignment act, may properly be availed of by appellant. It is conceded on all hands that appellant's claim is an honest one, and it is clear, from the evidence, that the assignee knew and was fully informed of the existence of the claim within three or four days after the assignment was made.

The judgments of the Appellate Court and of the county court of Will county will be reversed and the cause remanded to the county court, with directions to allow the prayer of appellant's petition.

Reversed and remanded.

MAGRUDER, C. J., and CARTWRIGHT, J., dissenting.

SWIFT & CO.

v.

PETER MADDEN.

Filed at Ottawa January 19, 1897.

1. ACTION—*a cause of action is the act or omission by a party which entitles another to sue.* The cause of action in suits for damages arising from negligence is the act done or omitted to be done by the defendant affecting the plaintiff which causes a grievance for which the law gives a remedy.

2. PLEADING—*when additional count does not aver a new cause of action.* Where the original declaration avers that plaintiff received his injury by reason of his master's failure to keep machinery in repair, the unsafe condition of which was unknown to plaintiff, an additional count averring that upon notification by plaintiff of the defect the master promised to repair the same does not set up a new cause of action.

3. MASTER AND SERVANT—*not necessary that master should fix a definite time on promising to repair.* To warrant a servant in relying upon his master's promise to repair defective machinery it is not necessary that the master should fix any time for making the repairs, as, in the absence of an express arrangement, a reasonable time will be implied.

4. SAME—*upon master's promise to repair, servant may remain a reasonable time.* Where the master, upon being notified by his servant of defective machinery which renders his service more hazardous, expressly promises to make the necessary repairs upon such machinery, the servant may continue in the employment a reasonable time, to permit the performance of the promise, without thereby being negligent.

5. VARIANCE—*objection of variance not made at trial is deemed waived.* A defendant desiring to take advantage of a variance between the declaration and the evidence should object to the evidence upon that ground when offered at trial, to enable the plaintiff to amend, and if this course is not pursued the objection to the evidence will be deemed waived.

6. EVIDENCE—*written statements contradicting witness' testimony—when incompetent.* Statements signed by a witness which contradict his testimony are not admissible in evidence when, after being read in detail to the witness, he admits that he made the contradictory statements therein set forth.

Swift & Co. v. Madden, 63 Ill. App. 341, affirmed.

165	41
166	33

165	41
170	167
170	210

165	41
174	584
74a	76
74a	576
75a	131
75a	382

165	41
79a	50

165	41
179	613
82a	113

165	41
182	22
182	364

165	41
89a	1822

165	41
98a	291

165	41
196	285

165	41
102a	416

165	41
104a	1817

165	41
106a	275
106a	1519
108a	480

165	41
e212	1259
212	280
212	575
d214	587
114a	259

165	41
e212	1259
212	280
212	575
d214	587
114a	259

165	41
e212	1259
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212	575
d214	587
114a	259

165	41
e212	1259
212	280
212	575
d214	587
114a	259

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

This was an action brought by Peter Madden, against Swift & Co., a corporation in Chicago engaged in the slaughtering and packing business, to recover damages resulting from a personal injury received while in the service of the company.

The first declaration filed by the plaintiff consisted of one count, to which the defendant filed a general demurrer. The demurrer was confessed, and on November 28, 1892, plaintiff filed an amended declaration, which contained, in substance, the following allegations: That the defendant, on the 7th of June, 1892, was engaged in the manufacture of a substance called glue, and while so engaged employed the plaintiff to shove or move certain buckets from one part of said factory or shop to other parts thereof, for the purpose of carrying articles used in the manufacture of said substance; that each of said buckets was hung on a hook attached to a pulley or bolt of iron, which pulley or bolt of iron was attached, at the other and upper end, to two wheels, which ran upon certain rails or lines of railway; that he was employed by defendant to move said buckets from one part of said factory to another, and thereby it then and there became the duty of defendant to have kept the said line or lines of railway and switches in a good and safe condition of repair, that the plaintiff might safely work at his said employment of moving the said buckets; that the defendant did not regard its duty in that behalf, nor use due care or diligence in that behalf, but, on the contrary thereof, negligently and wrongfully permitted and allowed said switches in said factory to be and remain in an unsafe and dangerous condition, so that the plaintiff, while so employed by defendant in shoving and mov-

ing said buckets from one part of said factory or building to another part thereof, with all due care and diligence on his part, turned a certain switch to move said bucket in the direction in which he was ordered to go with said bucket, on the day aforesaid, in said factory or building, but said switch, being in an unsafe and dangerous condition for want of repair, which fact was not known to the plaintiff, did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket on said rail or line of railway to move in the direction intended, but said switch closed and sprung back as plaintiff moved the bucket to turn the same upon said switch.

To the declaration the defendant filed a plea of not guilty, upon which issue was taken on December 24, 1892. After the cause was thus at issue no further steps were taken until the 23d day of June, 1894, when the plaintiff asked and obtained leave of court to file two additional counts. The first additional count contained, in substance, the following allegations: It then and there became the duty of the defendant, whenever the lines of railway so became broken or out of repair and dangerous and unsafe, to repair the same, that plaintiff might safely work at his said employment, yet the defendant, although notified that the lines of railway and switches were out of repair and unsafe, and although it promised that the lines of railway and switches should be at once repaired, and thereby caused the plaintiff to continue in his said employment, did not regard its duty in that, and carelessly and negligently permitted said lines of railway and switches to be and remain out of repair and in an unsafe and dangerous condition, etc. The second count of the additional counts alleged substantially as follows: The defendant, well knowing that a certain switch was out of repair and unsafe and dangerous, on said date, June 7, 1892, carelessly and negligently ordered the plaintiff to move a certain bucket from one part of the factory to another and over and across said switch which was then

and there out of repair and unsafe and dangerous, by means whereof the plaintiff, while so employed by defendant in moving and shoving said buckets from one part of the factory to another part thereof, over and across said switch, with all due care and diligence on his part, on the day aforesaid, moved said bucket in the direction he was ordered to go with it, which said switch did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket to move in the direction intended, but said switch closed and sprung back as the plaintiff moved the bucket upon the switch.

To the first additional count of plaintiff's declaration defendant pleaded the Statute of Limitations. The plaintiff demurred to the plea and the court sustained the demurrer. Defendant excepted to the decision of the court and elected to stand by the plea. Issue was taken on other pleas, and a trial was had before a jury, which resulted in a judgment for the plaintiff, which, on appeal, was affirmed in the Appellate Court.

JOHN A. POST, and JOHN B. BRADY, for appellant:

A new and separate cause of action cannot escape the operation of the Statute of Limitations by reason of being introduced by amendment of the declaration. *Phelps v. Railroad Co.* 94 Ill. 548; *Rolling Mill Co. v. Monka*, 107 id. 343; *Railroad Co. v. People*, 19 Ill. App. 141; *Railway Co. v. Rolling Stock Co.* 28 id. 79.

Although an amendment may properly be allowed, it does not necessarily, when allowed, have the effect of relating back to the date of bringing the suit, for the purpose of determining questions of limitations. *Smith v. Taggart*, 21 Ill. App. 541; *Railway Co. v. Traves*, 17 id. 136; *Railway Co. v. Cox*, 12 U. S. 905; *Gorman v. Judge*, 27 Mich. 138; *Phillips v. Holland*, 79 N. C. 31.

FRANCIS T. MURPHY, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The plaintiff received the injury complained of on June 6, 1892, and the additional count to which the Statute of Limitations was pleaded was not filed until June 23, 1894,—more than two years after the injury was received and more than two years after plaintiff's cause of action accrued. If plaintiff had brought no action until June 23, 1894, when he filed his additional counts, his action would have been barred by the Statute of Limitations; and it is also true that a new cause of action, distinct from that set out in the declaration, cannot be brought into the case by an additional count after the time for suing upon it has expired. The Statute of Limitations cannot be avoided in that way. In *Phelps v. Illinois Central Railroad Co.* 94 Ill. 548, where additional counts to the declaration were filed after the Statute of Limitations had run, and the statute was pleaded as a bar to the case made by the additional counts, it was expressly held that the solution of the question depended upon whether the additional counts set up entirely new causes of action. The question, then, to be determined is, whether the additional counts set up a new cause of action, or whether they contain a mere re-statement of the cause of action set up in the original declaration.

In a case like the one under consideration the cause of action may be regarded as the act or thing done or omitted to be done by one which confers the right upon another to sue,—in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy. (*Buntin v. Chicago, Rock Island and Pacific Railway Co.* 41 Fed. Rep. 744.) Was the act or wrong of the defendant towards the plaintiff, as set out in the additional counts, entirely new, or was it a mere re-statement of the act or wrong in a different form?

Upon an examination of the declaration as originally filed, it will be found that the allegation upon which a

right of recovery is predicated in substance was, that it was the duty of the defendant to keep in good and safe repair certain machinery which the plaintiff was required to use while in the service of the defendant as a laborer, but the defendant failed to observe its duty in that regard, but, on the contrary, negligently and wrongfully permitted the machinery to be and remain in an unsafe and dangerous condition, so that the plaintiff, while employed by the defendant in working with the machinery, with due care on his part, was injured. In the additional count to which the Statute of Limitations was pleaded, as we understand the count, the same cause of action is set up but in a different form. It is there, in substance, set out that it was the duty of the defendant, when the machinery was out of repair and unsafe and dangerous, to repair the same, yet defendant, although notified that the machinery was out of repair and unsafe, while it promised that the machinery should at once be repaired and thereby caused plaintiff to continue in its service, did not regard its duty, but carelessly and negligently permitted the machinery to be and remain out of repair and in an unsafe and dangerous condition. From the reading of the first count of the declaration in connection with the first additional count it is apparent that both state and rely upon the same wrongful act of the defendant,—its negligence in failing to keep in repair machinery in its factory where the plaintiff was required, by his employment with the defendant, to labor. We think it plain that the cause of action set out in the additional count was the same as set up in the original declaration. If we are correct in this, the court did not err in sustaining a demurrer to the plea of the Statute of Limitations.

It is next claimed that the court erred in refusing the following instruction:

"The court further instructs the jury, as a matter of law, that if they believe, from the evidence, that the

machinery in question was out of order, and that such fact was known to the plaintiff, and that the plaintiff called the attention of the defendant to such fact, and if the jury further believe, from the evidence, that the foreman in charge of the plaintiff promised to have said machinery repaired without fixing a time when the same should be repaired, and that said promise was indefinite as to when the same should be repaired, and that the plaintiff continued to work upon said machinery from day to day with the knowledge that the repairs were not made, then the court instructs the jury, as a matter of law, that the plaintiff assumed the risk of working thereon, and that he cannot recover in this case, and that the jury should find the defendant not guilty."

It was not necessary that the foreman should fix a definite time when the repairs should be made to enable plaintiff to recover for an injury received while engaged in the service of defendant after the notice was given. When the notice was given the foreman promised to see that the repairs should be made. This was, in effect, a promise to repair in a reasonable time, and the plaintiff could remain in the service of the defendant a reasonable time to permit the fulfillment of the promise without being guilty of negligence. The rule on this question is well stated by this court in *Missouri Furnace Co. v. Abend*, 107 Ill. 44. It is there said (p. 51): "It is now uniformly stated by text writers, that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service." We do not think the instruction contained a correct statement of the law, and it was therefore properly refused.

It is also claimed that there was a variance between the pleadings and evidence; that it was alleged in the declaration that defendant promised that the switches and appliances should be at once repaired, while the evidence shows that the promise was that the appliances would be fixed, without specifying the time. If the defendant desired to take advantage of a variance between the declaration and the evidence it was its duty to object to the evidence when offered, and state the nature and character of its objection, so that plaintiff might, if he desired, ask leave to amend the declaration. But this course was not pursued. No objection on the ground of variance was made when the evidence was offered. The objection not having been made at the time the evidence was offered, it must be regarded as waived, and the question of variance cannot be raised on appeal.

It is also insisted that the court erred in refusing to admit in evidence the two statements subscribed by the witness Manning, at the request of appellant or its attorneys, in November, 1892, and November, 1894, respectively, and which conflicted with his statements made on the witness stand. Manning was asked as to the contents of these statements, and the contents were in detail read to him, and he answered that he made the statements read to him on the dates mentioned, and explained his reasons for making the statements as he did, differing from those he testified to on the stand. As the witness admitted making the previous contradictory statements no further proof of that fact was required, and the defendant was in no manner injured by the exclusion of the offered evidence. A similar question was raised in *Atchison, Topeka and Santa Fe Railroad Co. v. Feehan*, 149 Ill. 202, and the offered evidence was held to be incompetent.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

EDWIN A. CASEY

v.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer.*Filed at Ottawa January 19, 1897.*

1. SPECIAL ASSESSMENTS—*requisites of certificate of publication of notice.* A certificate by special assessment commissioners that notice of application to confirm was published "five times" in a daily newspaper, the first and last papers containing the notice being dated, respectively, April 30 and May 5 following, does not show compliance with the statute, which requires publication on five successive days.

2. SAME—*judgment of confirmation cannot be collaterally attacked on application for sale.* The recitals in a judgment confirming a special assessment that "all the requirements of the statute" as to notice have been complied with, and that "due notice as required by law" was given by publication, etc., are not overcome by a defective notice or certificate of publication found in the record.

3. COLLATERAL ATTACK—*it is presumed the court heard evidence to sustain its finding.* It will be presumed that the court heard and acted upon sufficient evidence to sustain its finding, where the same is brought into question in a collateral proceeding.

APPEAL from the County Court of Cook county; the Hon. O. N. CARTER, Judge, presiding.

WILLIAM J. DONLIN, and CHARLES T. MASON, for appellant.

JOHN D. ADAIR, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of sale for a delinquent special assessment for the improvement of Frankfort street, in the city of Chicago.

But one question is raised on the record, and that is, whether or not the judgment of confirmation of the assessment was void for want of a sufficient certificate of the publication of the notice published by the commissioners. The certificate states that the notice was pub-

165	49
171	302
165	49
e189	*121
165	49
204	*295
165	49
207	*21
207	*66
207	*885
165	49
213	*370

lished five times in *The Chicago Mail*, a daily newspaper printed and published in the city of Chicago in said county; that the date of the first paper containing the notice was the 30th day of April, 1891, and that the date of the last paper containing it was the 5th day of May following, failing to show that the publication was upon five successive days. That this certificate was fatally defective has been decided in *Evans v. People ex rel.* 139 Ill. 552, followed in *Chandler v. People ex rel.* 161 id. 41.

But counsel for the People, conceding this to be true, insists that on this record the question does not necessarily arise, and in this position he must be sustained. The proceedings in the special assessment case, including the judgment of confirmation, were introduced in evidence upon the hearing by the objector. The judgment confirming the assessment recites that the commissioners had "complied with all the requirements of the statute as to posting and sending notices to the owners of the property assessed, and that due notice, as required by law, has been given by publication of this application and of the making and return of said assessment and of the time for the final hearing thereon." That this recital can not be overcome by a defective notice or certificate of publication found in the record has been often held by this court. (*Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 id. 307; *Sloan v. Graham*, 85 id. 26; *Hertig v. People*, 159 id. 237; *Dickey v. People ex rel.* 160 id. 633.) In the *Hertig* case it was insisted, as it is here, that the publisher's certificate to the notice for confirmation of the assessment was insufficient, and we held the appellant could take no advantage of the defect in that collateral proceeding, "for in such case the presumption would be that the court heard and acted upon other and sufficient evidence to sustain the finding."

On the authority of the above cases the judgment of the court below must be affirmed.

Judgment affirmed.

EDWARD W. ZANDER

v.

WALTER M. SCOTT *et al.**Filed at Ottawa January 19, 1897.*

165	51
170	126
165	51
185	85
165	51
187	1891

1. **HOMESTEAD**—*right must exist when judgment lien attaches.* A motion to set aside an execution sale of property on the ground that it was exempt as a homestead cannot be allowed where the affidavit on which it is based fails to show that the homestead right existed when the judgment became a lien.

2. **SAME**—*wife may claim homestead exemption, though not the head of a family.* The provision of the Exemption act (Rev. Stat. 1874, p. 497, sec. 1,) that "every householder having a family" is entitled to a homestead exemption, does not require such householder to be the head of the family, and a wife is entitled to the exemption in her separate property when occupied as a homestead by herself, husband and children.

3. **SAME**—*right not waived because not claimed before sale.* The right to a homestead exemption is not waived because not claimed before a sale of the property on execution, or because no objections were made to such sale.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

This cause arose upon a motion in the court below to set aside a sale of real estate on execution. The motion is based upon the affidavit of Elizabeth Scott, setting up that she is the owner in fee of the property sold, subject to an incumbrance, by mortgage, of \$3100; that the premises are improved by a frame house, and are worth, with all the improvements, approximately, \$4000; "that said lot of land and buildings thereon are occupied by affiant as her residence and constitute the homestead of affiant and her family; that her husband is living, and he, together with affiant and her seven children, occupy said premises as their homestead, and the same is the family residence." It then sets up the judgment against herself and husband, the issuing of the execution thereon and the sale of the premises for \$585.09, and that in the levy

and sale no homestead was set off, nor \$1000 to her or her husband in lieu thereof; that the sale was not for unpaid taxes or assessments or for debt or liability incurred for the purchase or improvement thereof, and no release of the homestead was made; that she and her husband are living together as husband and wife, and she makes the affidavit for the purpose of claiming the homestead exemption and having the sale thereof set aside. A counter affidavit by Edward W. Zander was filed, the substance of which is, that notwithstanding said Elizabeth Scott and her husband knew of the levy upon and intended sale of the premises, and by themselves and their attorneys made propositions for the payment and satisfaction of said judgment and postponement of the sale, they at no time claimed or gave him any notice whatever that the premises were occupied as a homestead or made any objection to the sale thereof. The court sustained the motion and set aside the sale and satisfaction of the judgment, from which this writ of error is prosecuted.

GEORGE A. DUPUY, for plaintiff in error:

To entitle claimant to exemption the real estate must have been a homestead when the judgment was rendered, and became a lien, as well as when the sale was made. *Reinbach v. Walter*, 27 Ill. 393; *Tourville v. Pierson*, 39 id. 452; *Chappell v. Spire*, 106 id. 475; *Rock v. Haas*, 110 id. 528.

The real estate of the wife is not exempt from sale for payment of the wife's debts. *Getzler v. Saroni*, 18 Ill. 517; *Kenley v. Hudelson*, 99 id. 499; *Ryhiner v. Frank*, 105 id. 331; *Titman v. Moore*, 43 id. 174; *Vasey v. Trustees*, 59 id. 191.

The homestead right, if any, was waived. *Wright v. Dunning*, 46 Ill. 275; *Monroe v. Snow*, 33 Ill. App. 230.

SPENCER WARD, for defendants in error:

Homestead granted on application of either spouse will avail the other. *Waples on Homestead*, 120-126; *Thompson on Homestead*, secs. 220-226.

The principle upon which the cases all rest is, the homestead exemption is intended for the benefit of the debtor's family as much as for himself. *Asher v. Mitchell*, 92 Ill. 486.

If premises belong to the husband, the wife has the right to claim them as a homestead. *Boyd v. Cudderback*, 31 Ill. 118.

Where title to the "lot of ground" and the buildings thereon is in the wife, and she, with her husband and the family, resides thereon, that lot is the homestead. *Tourville v. Pierson*, 39 Ill. 453.

The law exempts the homestead from sale under execution, and the debtor is required to perform no act, to discharge no duty or manifest an intention to avail himself of its benefits. *Imhoff v. Lipe*, 162 Ill. 285.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Three grounds of reversal are urged: First, it does not appear from the affidavit on which the motion was based that the premises were occupied by Mrs. Scott as a residence at the time the judgment became a lien upon the same; second, the wife's real estate is not exempt from sale for payment of her debts, though occupied by herself, husband and children as a home; and third, the homestead right, if any existed, was waived.

The judgment was rendered October 16, 1895, the sale made on the 26th of the next month, and the affidavit and motion to vacate the sale were not filed until February 5 following,—three and a half months after the judgment became a lien. The language of the affidavit, as above shown, is, "that said lot of land and buildings thereon *are* occupied by appellant as her residence and *constitute* the homestead of appellant and her family; that her husband is living, and he, together with the affiant and her seven children, *occupy* said premises as their homestead and the same *is* the family residence." All these expressions as to occupancy are in the present

tense, and the affidavit wholly fails to show that the premises were at any time so occupied previously to making the affidavit and motion. It is therefore not shown that they were so occupied when the judgment became a lien nor even when the sale was made. In *Reinbach v. Walter*, 27 Ill. 393, in which case the defendant attempted to set up homestead rights against an action of ejectment, it was said: "As the defendant did not prove that any portion of the premises were his homestead at the time the judgment was rendered and when the lien attached, the law has no application. The proof is, that it was his homestead at the time of the sheriff's sale. He may have moved upon the premises but the week before." To the same effect are *Tourville v. Pierson*, 39 Ill. 446, *Chappell v. Spire*, 106 id. 472, and *Rock v. Haas*, 110 id. 528. Indeed, it seems clear, upon principle, that in the absence of some express provision of the statute the right of exemption from execution sale, in order to be availed of, must exist at the time the lien attaches.

We do not think either of the other positions assumed can be maintained, but as the judgment of the court below must be reversed for the reasons stated, it will be unnecessary to discuss them at length. As to the contention that the real estate of the wife is not exempt from sale for payment of her debts, we think the law is otherwise. The language of section 1 of the statute entitled "Exemptions" is, that "every householder having a family shall be entitled to an estate of homestead, to the extent in value of \$1000, in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence." We see no reason why a wife, though living with her husband, may not be considered a householder under this provision. The statute does not make it necessary that the party claiming the exemption should be the head of a family. It is sufficient that he or she be a "householder having a family."

The homestead right was not waived merely because it was not claimed before the sale. *Imhoff v. Lipe*, 162 Ill. 282.

The judgment will be reversed and the cause will be remanded, with directions to the Superior Court to overrule the motion.

Reversed and remanded.

THE PEORIA SAVINGS, LOAN AND TRUST COMPANY

v.

JOSEPH ELDER *et al.*

Filed at Ottawa January 19, 1897.

165	55
84a	*266
165	55
206	*682

1. **LEVY**—*when levy on personal property is not a satisfaction of judgment.* A levy upon sufficient personal property to satisfy a judgment will not operate as a satisfaction where the property levied upon by the sheriff is afterwards, by order of court, turned over to the debtor's receiver.

2. **GUARANTY**—*unambiguous contract must be interpreted according to the language used.* A contract of guaranty unambiguous in its terms must be interpreted according to the clear import of the language used as expressing the intention of both parties.

3. **SAME**—*when contract operates from its date though not signed till later.* The fact that a contract guaranteeing the payment of notes discounted by a bank "from time to time after the date" of the contract is not signed or delivered until a later day, will not relieve the guarantor from liability on notes discounted between the date of the contract and the time of its signing and delivery.

4. **SAME**—*guaranty "to the extent" of a certain amount merely limits guarantor's liability.* A guaranty of the payment of notes discounted by a bank "to the extent" of a certain amount merely limits the guarantor's liability beyond that amount, and does not contemplate the exhausting of the entire credit before his liability is fixed.

5. **SAME**—*"from the date" of a contract means "after" such date.* A guaranty of the payment of notes discounted by a bank "from the date" of the contract will not cover a note presented for discount on such date, and in the absence of contrary proof a note bearing an even date with the contract will be presumed to have been delivered and presented for discount on the date of its execution.

6. SAME—when guaranty covers a note given for pre-existing debts. Where a contract guarantees the payment of notes discounted by a bank "from the date" thereof, a note discounted by the bank after such date is covered by the guaranty, although it is given to cancel a note given to the bank before the contract was made.

Peoria Savings, etc. Co. v. Elder, 65 Ill. App. 567, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. THOMAS M. SHAW, Judge, presiding.

Appellant prosecutes this appeal to reverse a judgment of affirmance in the Appellate Court. The action was assumpsit upon the following instrument, against all the makers:

"PEORIA, ILL., Jan. 17, 1893.

"*To the Peoria Savings, Loan and Trust Company:*

"GENTLEMEN—We make this request and guaranty to you, viz.: That the Peoria Pump and Implement Company, of this city, (incorporated,) may, from time to time from date hereof until further notice, present to you its promissory notes and business paper for discount or advance, to the extent of \$12,000. In case that it shall do so, we request you to discount such notes or said paper endorsed by them, or make such advance to them, and in consideration of the terms and one dollar to us in hand paid by you, the receipt of which is hereby acknowledged, we hereby guarantee the prompt payment at maturity of the principal and interest of all promissory notes and business paper or open account made or endorsed by said Peoria Pump and Implement Company, and discounted or advanced upon by you for said company; and we waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time covered by same.

"Witness our hands and seals at Peoria, Illinois, this 17th day of January, 1893.

G. G. GEIGER, [Seal.]

G. H. WYMOND, [Seal.]

E. T. BRAWLEY, [Seal.]

JOSEPH ELDER. [Seal.]"

The first and second counts of the declaration allege that in consideration of said guaranty plaintiff discounted and advanced the money upon a note of the pump com-

pany for \$2000 dated January 27, 1893, payable March 26, 1893, with seven per cent interest from maturity, and another for \$2000 dated February 14, 1893, payable ninety days after date, with seven per cent interest from maturity, both of which were made payable to the order of plaintiff. The third count alleges discounts and advances upon the following notes by the pump company, payable to the order of the plaintiff, to-wit: One for \$500, dated January 17, 1893, due thirty days after date; one for \$1572.76, dated January 18, 1893, due thirty days after date; one for \$2000, dated January 23, 1893, due ninety days after date; one for \$2000, dated January 27, 1893, payable March 21 after date; one for \$2000, dated January 27, 1893, payable March 26 after date; and one for \$2000, dated February 14, 1893, payable ninety days after date,—each bearing seven per cent interest from maturity. There was no service on the other defendants, and they did not appear. Appellees pleaded non-assumpsit and certain special pleas. The trial was by the court without a jury and the finding for the plaintiff, its damages being assessed at \$1661.67.

The evidence showed the execution of the several notes described in the third count of the declaration, and the payment of the money thereon by way of discount or advancement by the plaintiff. These are plain promissory notes, signed by G. H. Wymond, president of the Peoria Pump and Implement Company, payable to the Peoria Savings, Loan and Trust Company or order. On February 11 the pump company gave the bank a judgment note, for which the latter gave this receipt:

"PEORIA, ILL., Feb. 11, 1893.

"Received of the Peoria Pump and Implement Company one certain judgment note executed by the said company to the Peoria Savings, Loan and Trust Company of Peoria, Illinois, for the sum of \$12,000, dated the 11th day of February, 1893, and payable one year after date, which note is given and is to be used as collateral security for the payment of any loans, advances, discounts or other liability of the said Peoria Pump and Imple-

ment Company to the said Peoria Savings, Loan and Trust Company now existing or hereafter to be incurred, as well as collateral security for the benefit of the signers of a certain instrument of guaranty to the said Peoria Savings, Loan and Trust Company, dated the 17th day of January, 1893, signed by Joseph Elder, G. G. Geiger, G. H. Wymond and E. T. Brawley as guarantors, it being the understanding that the Peoria Savings, Loan and Trust Company is to advance to the said Peoria Pump and Implement Company, from time to time, as long as they shall deem it safe to do so, moneys to be used in its business, to the amount, if necessary, of \$12,000, including its present liability to said Peoria Savings, Loan and Trust Company.

PEORIA SAVINGS, LOAN AND TRUST CO., Peoria, Ill.
C. T. HEALD, *Cashier.*"

On the 23d of the same month judgment by confession was entered on said note for \$11,122.76, being the amount then due on the six promissory notes above described, and a Pittsburg draft for \$1000 which the bank had theretofore discounted. Execution issued on this judgment and was levied upon all the property belonging to the pump company. A suit in chancery was afterwards begun by another of the company's creditors to wind up its affairs and for the appointment of a receiver. To that action these parties, the corporation and others, were duly served as defendants. A receiver was appointed, who, by order of the court, took possession of the assets levied upon under the bank's execution and converted the same into money, which, after payment of costs, was turned over to the bank, subject to the rights of all parties interested. Deducting the Pittsburg draft, which had been paid, the amount due the bank on its judgment July 10, 1894, was found to be \$10,822.29. On that day the court ordered the receiver to pay the bank \$6584.09, and also authorized it to retain \$320.79, balance of deposit in its hands to the credit of the pump company,—in all \$6904.88,—leaving still due on its judgment as determined by the court upon the trial, \$3918.43. This balance, with five per cent interest thereon from April 10, 1894, to July 25, 1895, (the date of the judgment,) amounting to \$4122.51,

was found to be due from the pump company to the bank. The court, however, held the defendants, as guarantors, liable only upon three of the six notes included in the confessed judgment, namely, those of January 17 and 18 and of February 14, for \$500, \$1572.76 and \$2000, respectively, amounting to \$4072.76, and gave judgment against them for the proportionate part of the \$4122.51 upon that basis, which was found to be the said sum of \$1661.67. The three notes held not within the terms of the guaranty were those of January 23 and 27, each for the sum of \$2000, which were given for notes of the same amount held by the bank at the date of the guaranty but not then due. The one of January 18, for \$1572.76, included in the judgment, was given in payment of a note for that amount made by a third party, payable to the pump company, and by it discounted at the bank prior to the date of the guaranty.

Plaintiff appealed, and upon errors assigned upon the record insisted in the Appellate Court that the court below erred in not holding the defendants liable for the whole amount remaining unpaid, (\$4122.51,) and also insisted that, even if they were not so liable, the bank had the right to credit the amount paid it by the receiver, and on deposit, upon the notes of the pump company in the order of their maturity, and having done so, only the last two, being those described in the first and second counts of the declaration, remained unpaid, and therefore the defendants were at least liable as guarantors for the whole amount due on the \$2000 note dated February 14, 1893. It made the further contention that interest should have been computed on the amount found in its favor, at seven per cent, as contracted for in the notes, instead of at the rate of five per cent upon the judgment.

The defendant Elder filed cross-errors, upon which he contended that the trial court erred in holding him liable for any part of said indebtedness, because the bank had failed and refused to discount or make advancements to

the pump company to the full amount of \$12,000, and because the contract of guaranty was not in fact signed and returned to the bank until after each of the notes had been discounted; also, that by a proper construction of the contract sued upon it did not guarantee the payment of either the note dated January 17, for \$500, or January 18, for \$1572.76; further, that the \$2000 note dated February 14 was not within the terms of the guaranty, because the giving of the note of February 11, with power to confess judgment, amounted to a new arrangement between the pump company and the bank, working a release of all liability on the part of the defendants as guarantors; that the trial court erred in refusing the defendants leave to file an additional special plea during the progress of the trial; and finally, that the levy of the execution on the confessed judgment upon the assets of the pump company sufficient to satisfy the same operated as a satisfaction of that judgment.

The Appellate Court overruled each of these several alleged errors and cross-errors and affirmed the judgment of the circuit court. Appellant again appeals, and both parties question the correctness of that judgment.

HAMMOND & WYETH, for appellant.

JACK & TICHENOR, for appellee Elder.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Several of the questions raised may be briefly disposed of. The judgment note of February 11, 1893, did not release the defendants from their liability as guarantors. The receipt given for that note clearly recognized the continuation of that liability by stating that it was given as collateral security both for the benefit of the bank and the signers of the contract of guaranty dated 17th of January. We agree with the Appellate Court that the several notes for which it was given as collateral were merged in the confessed judgment by the voluntary

act of the bank, and therefore interest was properly computed upon the judgment; also, that the amount paid the bank by the receiver should have been credited on the amount found due it by the judgment, and not upon certain of the notes included in that judgment, as it claimed to have done.

The position of the appellee Elder, that the levy of the execution operated as a satisfaction of that judgment, is clearly untenable. The property levied upon was taken from the sheriff in the chancery proceeding to which he was a party, and, so far as the record shows, the order directing the assets of the company turned over to the receiver has been acquiesced in by him. The levy of an execution upon sufficient personal property to satisfy a judgment is never an absolute satisfaction of such judgment, but is only so *sub modo*.

Of the plea which the court denied leave to file pending the trial, it need only be said it presented no defense whatever to the action.

The remaining questions in controversy must be determined from the contract itself. In our opinion that instrument is clear and unambiguous in its terms, and must therefore be interpreted and construed according to the language used,—that is to say, the parties must be presumed to have meant that which their language clearly imports. It is not what one of the parties may have intended, but what is shown by the contract to have been the intention of both parties. (*Williams v. Fletcher*, 129 Ill. 356.) It is only when the language used is ambiguous or of doubtful meaning that the court may resort to construction, taking into consideration all the facts and circumstances surrounding the parties at the time the contract was entered into. The rule that the contract of a surety or guarantor must be strictly construed has no application to this case.

First—The undertaking to guarantee the payment of notes presented from time to time, *after the date of the con-*

tract, is clearly expressed, and the fact that it was not signed and delivered until after certain of the notes had been discounted or advanced upon was of no consequence. The agreement is not a guaranty of the payment of the notes presented after the signing and delivery of the contract, but of such as should be presented "from time to time from" the date of January 17, 1893. *Abrams v. Pomeroy*, 13 Ill. 133.

Second—There is nothing in the language employed indicating an intention that it was upon condition that advancement or discounts to the full amount of \$12,000 should be made, as contended by appellee Elder. "To the extent of \$12,000" clearly expresses the intention that the guarantors shall be liable to that limit, and no further. It fixes the extent to which they would be bound, and in no sense is a condition qualifying their liability. This is the plain, well-understood meaning of the language used, and it cannot be changed, varied or modified by parol evidence. *Abrams v. Pomeroy, supra*.

Third—We think it equally clear that the obligation was only for the payment of the notes presented subsequently to the date of the contract,—January 17, 1893. "From time to time from date hereof" means "after date hereof." The date of the note is *prima facie* evidence of the time of its delivery, and in the absence of proof to the contrary the \$500 note bearing the same date as the contract must be held as having been presented *on*, and not *after*, that date. The date of an instrument is understood to be the day on which it is written, and "from" or "after" that date clearly means some subsequent day. The question is not whether the note was, in point of time, made after the guaranty was written, but was it "presented" to the bank after the *date* of such guaranty.

Fourth—Counsel for appellee Elder insist that the defendants, though liable for promissory notes and business paper of the pump company presented after that date, and discounted or advanced upon by the bank, are not

liable for any such note or notes if they were given in payment of pre-existing indebtedness,—and the circuit and Appellate Courts seem to have sustained that position as to those given in payment of the company's own notes, but not as to the one for \$1572.76, made by a third party to the pump company and discounted for it by the bank. The appellant, on the other hand, insists that it was error to refuse judgment for the three \$2000 notes, —one of January 23, and two of January 27. We are unable to see upon what reasoning it can be held that a liability existed upon the \$1572.76 note and not upon the other three, and we think that by the terms of the agreement the parties undertook to guarantee the payment of each of them. There is no dispute as to the fact that they were all presented for discount after January 17, 1893,—that is, they were each presented to the bank for the purpose of obtaining the money upon them after that date. Whether that money was delivered directly to the pump company, or by its direction applied in payment of debts due from it to the bank, could by no fair interpretation of the contract make the slightest difference. Nothing whatever is said in the instrument as to the consideration or object for which notes shall be presented or the purpose for which the money advanced or received upon them should be used by the company. If upon their presentation the bank had discounted them and paid the money over its counter to the pump company, and that company had immediately paid the same money back in discharge of its indebtedness then due to the bank, it could scarcely have been contended that the guarantors were not liable by the terms of their guaranty. And yet the transaction as it occurred was in substance the same.

The contention of the defendants seems to be that the three \$2000 notes were mere renewals of notes held by the bank. If by this is meant that the old notes were kept alive, or that this action is in any sense for the purpose of compelling the payment of the old notes, the

facts do not support the contention. They were fully paid and discharged and the liability of the parties fixed by the terms and conditions of the new notes made and "*presented*" to the bank "*from time to time*" after the date of January 17, 1893, and this suit is to recover the amount of the new notes remaining unpaid. It is doubtless true, as contended by counsel for appellee Elder, that the object of making the guaranty was to give the pump company additional credit with the bank and relieve it from financial embarrassment, but at least one of the necessities for that additional credit was its indebtedness, and we are unable to discover anything in the instrument itself, or in the oral testimony showing the condition and position of the parties, from which it can be said its liability to the bank was not to be paid with money so obtained, as well as debts owing from it to other parties. It can scarcely be supposed that it was the intention that the bank would advance money from time to time with which to pay other obligations and liabilities, and at the same time leave its own debts wholly unprovided for,—at least there is no such qualification or limitation found in the contract of guaranty, and the court has no power to so construe it.

We do not deem it necessary to enter upon a consideration of the question as to what is regarded by bankers as discounts, but base our conclusion as to the liability of the defendants upon what we regard as the plain and unequivocal meaning of the words of the agreement.

We think the circuit court erred in holding the defendants liable for the \$500 note of January 17, 1893, and also in holding them not liable for the amount of each of the three \$2000 notes,—one dated January 23 and two January 27, 1893. Its judgment and that of the Appellate Court will accordingly be reversed, and the cause will be remanded to the circuit court with directions to proceed according to the views herein expressed.

Reversed and remanded.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer,
v.

SAMUEL B. LINGLE, Trustee.

Filed at Ottawa January 19, 1897.

1. SPECIAL ASSESSMENTS—*judgment of confirmation can be attacked collaterally only for want of jurisdiction.* A judgment of confirmation of a special assessment cannot be attacked collaterally except for matters going to the jurisdiction of the court in entering the judgment.

2. SAME—*sufficiency of ordinance must be determined on judgment of confirmation.* That an ordinance did not sufficiently describe the nature, character and locality of an improvement is not an available objection to an application for a judgment of sale for a delinquent special assessment.

3. NAMES—*signing "J. F." instead of "John F." by special assessment commissioner.* Upon the point that the name of one of the special assessment commissioners appointed was "John F. Kenny," while the assessment roll was signed "J. F. Kenny," this decision follows *Casey v. People*, 159 Ill. 267.

APPEAL from the County Court of Cook county; the Hon. O. N. CARTER, Judge, presiding.

On an application by the county treasurer and *ex officio* collector of Cook county for judgment on delinquent special assessments levied by the city of Chicago for laying six-inch drains on West Twenty-sixth street, from Sacramento avenue to Lawndale avenue, in that city, the appellee appeared and filed objections to entering judgment against certain lots in the record described. These objections were, first, as to the validity of the ordinance; and second, as to the validity of the assessment roll. This latter objection was, that the commissioners appointed to spread the assessment roll did not act, inasmuch as one John F. Kenny was one of those appointed and J. F. Kenny acted.

The ordinance provided in section 1 "that a six-inch drain be and is hereby ordered laid from each of the lots

166 65
170 247
172 573
173 42
173 592

165 66
84a 47

165 65
187 1897

165 65
188 1539

165 65
189 1 84

165 65
204 295

hereinafter described, abutting on West Twenty-sixth street, from Sacramento avenue to Lawndale avenue, in said city, to connect with the public main sewer in West Twenty-sixth street, in front of and adjoining such lots or parcels of land." It was contended this was not a sufficient description of the nature, character and locality of the improvement.

The objections were sustained, judgment of sale refused, and the People appealed.

JOHN D. ADAIR, for appellant.

WILLIAM J. DONLIN, and CHARLES T. MASON, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On an application for judgment against lots or lands for delinquent special assessments an objection to the judgment because of the insufficiency of the ordinance under which the assessment is made is a collateral attack on the judgment of confirmation of the assessment. The judgment of confirmation cannot be thus attacked except for matters affecting the jurisdiction. The sufficiency of the ordinance is not of that character, and must be determined on the proceeding to confirm the special assessment. *Doremus v. People ex rel.* 161 Ill. 26; *Culver v. People ex rel.* id. 89, and authorities cited.

The objection that John F. Kenny was appointed a commissioner and J. F. Kenny signed the assessment roll is determined adversely to the objector in *Casey v. People ex rel.* 159 Ill. 267.

The judgment of the county court of Cook county is reversed and the cause remanded, with directions to enter judgment of sale as applied for by the county treasurer and *ex officio* collector of Cook county.

Reversed and remanded.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer,

v.

JOHN H. COLVIN.

Filed at Ottawa January 19, 1897.

1. SPECIAL ASSESSMENTS—*when judgment of confirmation is not affected by subsequent orders.* The validity of a judgment of confirmation is not affected by an order entered at a subsequent term, at the instance of the petitioner, vacating the judgment and dismissing the petition, where, at the same term, another order is entered vacating the former order and re-instating the cause.

2. SAME—*what not sufficient objection to application for judgment of sale.* Where a court had jurisdiction to enter a judgment confirming a special assessment, an objection that the record showed that the estimate of the cost of the improvement was made prior to the passage of the ordinance cannot be sustained to the application for judgment of sale for delinquent installments.

APPEAL from the County Court of Cook county; the Hon. O. N. CARTER, Judge, presiding.

JOHN D. ADAIR, for appellant.

WILLIAM J. DONLIN, and GILBERT G. OGDEN, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county refusing an application by the county collector for an order of sale of property belonging to appellee, returned as delinquent, for an installment of a special assessment levied by the city of Chicago for curbing a portion of Prairie avenue. The objections relied upon as sustaining the judgment below are, that "the special assessment upon which the application is based has not been confirmed as required by law," and that the judgment of confirmation rendered is void.

It is not denied that there was a judgment of confirmation entered on February 19, 1892, but it appears

165	67
170	247
185	67
202	88

from the record that on the 25th of April following, a motion of the attorney for the city of Chicago that all orders heretofore entered in said cause be vacated and the petition dismissed was allowed; also, that on the 30th of the same month, on motion of the same attorney, it was ordered "that the order entered herein, dismissing the petition and vacating the orders heretofore entered in said cause, be and the same are hereby vacated and the said cause is hereby re-instated." The contention on the part of the objector is, that the order of April 25 vacated the judgment of confirmation, and that the subsequent order setting aside the vacation and re-instating the cause did not revive the judgment of February 19.

It is insisted on behalf of appellant that the order of April 25, being made after the term at which the judgment of confirmation was rendered, was a nullity for want of jurisdiction of the court to vacate its former judgment, and authorities are cited which are supposed to sustain this contention. We do not think them in point. Here was an attempt on the part of the city, which was the petitioner, to vacate a judgment in its own favor and dismiss its own proceeding, and, if the case was upon the docket at the April term, we know of no rule of law which would prevent the court from permitting it to do so if it saw fit. If, however, it had jurisdiction at that term to make the order, it would seem clear that if the parties were still before the court, (and there is nothing in this record to show that they were not,) it also had jurisdiction to make the second order vacating the first. When the first order was set aside and the cause re-instated upon the docket it was there just as it would have been if the order of April 25 had never been made. There was, in our opinion, an order or judgment of confirmation of the assessment by the county court.

The second objection is based upon the contention that the record shows that the estimate of the cost of the improvement was made prior to the passage of the ordi-

nance. It is true, the certificate of the city clerk shows that the ordinance authorizing the improvement was passed on the 4th day of January, 1892, whereas the estimate of the commissioners was approved on the 26th day of October, 1891, which, of course, was several months prior to the passage of the ordinance. The report of the commissioners, however, shows that the estimate was made under an ordinance previously passed, and when the whole record is considered we think it sufficiently appears that the statement of the clerk that the ordinance was passed January 4, 1892, was a mistake. But if it were otherwise, we think it clear that this objection is one which could not be properly made for the first time upon application for judgment of sale for the delinquent assessment. Section 39, article 9, chapter 24, of the Revised Statutes of 1874, provides that the report of a delinquent special assessment by the collector "shall be *prima facie* evidence that all the forms and requirements of the law in relation to making said return have been complied with, and that the special assessment mentioned in said report was due and unpaid; and upon the application for judgment upon such assessment no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof." It is not claimed that the court did not have jurisdiction of the cause and of the parties when the judgment of confirmation was entered, and we have frequently held that, where such jurisdiction appears, no objection which could have been urged against the confirmation can be made against the petition of the collector for judgment of sale, which decisions simply give effect to the foregoing statute. (*West Chicago Street Railroad Co. v. People*, 156 Ill. 18, and cases cited; *Kimball v. People*, 160 id. 653, citing *Fisher v. People ex rel.* 157 id. 85.) It cannot be contended that this second objection, if valid, was not available to the objector upon the application

for confirmation of the special assessment, and this case forcibly illustrates the wisdom of the statute and decisions above cited. If, as we think it may be fairly inferred from the record, the date January 4, 1892, was a mistake inadvertently made by the city clerk, it could then have been readily corrected without defeating the assessment.

In our opinion neither of the objections interposed in the court below was valid, and the court erred in sustaining them and refusing the judgment applied for.

The judgment will be reversed and the cause remanded, with directions to the court below to enter a judgment of sale as applied for.

Reversed and remanded.

THE INDUSTRIAL BANK OF CHICAGO

v.

EDWIN J. BOWES, JR. *et al.*

Filed at Ottawa January 19, 1897.

1. **BILLS AND NOTES**—*when an instrument is a check, and not a bill of exchange.* An architect's certificate addressed to the owner of a building, reciting that there was due the contractor a certain sum, upon which the owner endorsed an order to a firm which was advancing money for the construction of the building, to pay the contractor, is in substance a check, and not a bill of exchange.

2. **SAME**—*liability of drawer of bill of exchange on failure of prompt presentment and notice of dishonor.* A bill of exchange must be presented to the drawee for acceptance within a reasonable time, and if payment is refused, prompt notice thereof must be given the drawer, or he will be discharged from liability thereon.

3. **SAME**—*liability of drawer of check on failure of prompt presentment and notice of dishonor.* Failure to promptly present a check for payment and to give prompt notice to the drawer of its dishonor will not discharge the drawer from liability thereon unless he has suffered some loss or injury thereby, and then only in proportion to the loss sustained.

Bowes v. Industrial Bank of Chicago, 64 Ill. App. 300, reversed.

165	70
89a	*888
165	70
94a	*142

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

This was an action of assumpsit brought by the Industrial Bank of Chicago, against Edwin J. and John R. Bowes, on the following instrument:

"\$500.

No. 4794.

"To E. J. Bowes, Jr. & Bros.:

CHICAGO, June 17, 1892.

"This is to certify that the Empire Building Company, contractor for the entire work of your building No.....Fulton street, is entitled to a payment of \$500 by the terms of the contract.

Contract.....	\$7850	Remarks.
Extra Work.....		
Deductions.....		
Total.....		
Previous Issues.....	\$6325	
Present Issue.....	500	\$6025
Balance.....		\$625

WILSON & MARBLE.

By A. H. DODD."

Endorsed on the back thereof appears the following:

"Peabody, Houghteling & Co.:

"Pay to the order of Empire Building Company."

JOHN R. BOWES."

"Pay to the order of Industrial Bank.

EMPIRE BUILDING CO.,

G. C. MCARTHUR, Treas."

On a trial in the Superior Court of Cook county the bank recovered a judgment for the amount named in the order, but on appeal to the Appellate Court the judgment was reversed and a judgment entered in favor of the appellees. The court also made a finding of facts, which was incorporated in the judgment, as follows:

"June 17, 1892, Bowes Bros., by indorsement on an architect's certificate, gave an order to Peabody, Houghteling & Co. to pay to the Empire Building Company the sum of \$500, such paper being drawn on account of a contract of \$7850 for a building of Bowes Bros. under a building loan furnished by Peabody, Houghteling & Co.;

that on said date \$525 remained to be drawn on similar architect's certificates and orders; that the cashier of Peabody, Houghteling & Co. was temporarily out of the office, so payment was not made to the Empire Building Company, and the Industrial Bank bought the paper from said building company on the day of its date; that the Industrial Bank had the paper presented for payment to Peabody, Houghteling & Co. twice,—once on June 19 and in the last week in June, 1892,—and they said they were not ready to pay; that the Industrial Bank had the paper presented by Schaar (cashier) to Peabody, Houghteling & Co. about July 17, 1892, and it was not paid, and again by Schaar about fourteen days thereafter, and payment was refused because Peabody, Houghteling & Co. had paid all the money out; that about August 3, 1892, Henriques (assistant cashier) presented the paper for the bank to Peabody, Houghteling & Co., and payment was refused for lack of funds, and for the first time on August 4, 1892, Bowes Bros. were notified that payment of the paper was refused; that Peabody, Houghteling & Co. have not failed or been financially embarrassed since June 17, 1892; that after the paper sued on was issued, the fund and the amount of the contract were exhausted; that all the parties interested lived in Chicago, and Bowes Bros. were well known business men; that the Empire Building Company broke up in business before this suit was begun. It was therefore considered by the court that appellants recover from appellee their costs expended in Appellate and Superior Courts, and have execution therefor."

JONES & STRONG, for appellant.

WOOLFOLK & BROWNING, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It was conceded on the trial that John R. Bowes was authorized to sign for E. J. Bowes, Jr. & Bros., and that his signature represented the firm.

The certificate of the architect set out in the statement shows that on June 17, 1892, there was due to the Empire Building Company, the contractor, from Bowes Bros., the defendants, \$500. Peabody, Houghteling & Co. had made Bowes Bros. a building loan, and the money was drawn, from time to time, on architect's certificates, as needed, to pay for the construction of a building. On the back of the certificate of the architect issued June 17, 1892, for \$500, Bowes Bros. wrote the following:

"*Peabody, Houghteling & Co.:*

"Pay to the order of the Empire Building Company.

JOHN R. BOWES."

This certificate was subsequently endorsed to the Industrial Bank by the Empire Building Company, and the bank failing to collect the money named in the certificate, brought this action against Bowes Bros. on the writing they had executed on the back of the certificate of the architect. The bank recovered a judgment in the Superior Court for the amount claimed to be due, but in the Appellate Court the judgment was reversed on the ground that the instrument sued upon was a bill of exchange, and plaintiff could not recover for the reason it had failed to notify Bowes Bros. at once of the refusal of Peabody, Houghteling & Co. to pay upon the presentation of the order.

The law is well settled that a bill of exchange must be presented to the drawee within a reasonable time, and where payment is refused notice must be given promptly to the drawer, otherwise he cannot be held liable. (*Montelius v. Charles*, 76 Ill. 303; *Bickford v. First Nat. Bank of Chicago*, 42 id. 238; Story on Promissory Notes, sec. 492.) But was the instrument sued on strictly a bill of exchange, so that it should be governed by the rules of law applicable to such instruments? To a bill of exchange there are three parties—drawer, drawee and payee. The drawee is not bound until acceptance, and then, having become the acceptor, he is regarded as primarily the

promisor and as the drawer only collaterally, and the drawer is therefore liable in very much the same way as the endorser of a note. (1 Parsons on Contracts, 250.) In Story on Promissory Notes, (sec. 4,) in pointing out the distinction between bills of exchange and promissory notes, the author says: "In a bill of exchange there are ordinarily three original parties,—the drawer, the payee and the drawee, who, after acceptance, becomes the acceptor. In a bill of exchange the acceptor is the primary debtor, in the contemplation of law, to the payee, and the drawer is but collaterally liable." The author also says: "The indorser of a note stands in the same relation to the subsequent parties as the drawer of a bill, and the maker of the note is under the same liabilities as the acceptor of a bill." In the forms of bills of exchange given by Chitty in his work on Bills it will be found the time of payment is always specified, and on page 170, while the author admits that the omission to state the time of payment would not render the bill invalid, he says: "It is advisable in all cases to express the time of payment as clearly and intelligently as possible, and it is therefore usual to write it in in words."

As a general rule it is understood that a bill of exchange will be accepted by the drawee, hence it is drawn payable on sight, or in thirty, sixty or ninety days, and when presented to the drawee it is accepted, and from that time he becomes bound to pay. The instrument in question contains no time of payment, nor is there anything to indicate, from the reading thereof, that it was ever intended to be accepted by the drawee, as is usually the case with a bill of exchange. While it has some of the characteristics of a bill of exchange, we do not regard it as such. On the other hand, it has all the elements of a check, and we think it clearly falls within the definition given in the text books of a check. In 2 Daniel on Negotiable Instruments (528) the author says: "A check is a draft or order upon a bank or banking house,

purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand." In 2 Parsons on Notes and Bills the author says (p. 57): "A check is a brief draft or order upon a bank or banking house, directing it to pay a certain sum of money." These definitions of a check were quoted and approved by this court in *Ridgely Bank v. Patton*, 109 Ill. 479. Here, Peabody, Houghteling & Co. was not a regular bank, but the firm was the banker of Bowes Bros. and was so treated and recognized, and, so far as the check in question is concerned, the firm will be regarded as a bank. The instrument in question was, then, a draft or order upon a banking house directing it to pay a certain sum of money, and, as declared by Parsons, a check; or it was a draft or order upon a banking house, purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a person or order, and payable instantly on demand,—which Daniel declares to be a check. Under either definition the instrument in question was a check.

The instrument being a check, did the Industrial Bank lose its right to recover from the drawers of the check, for the reason the bank failed to present it for payment within proper time, and failed to give notice to the drawer of the refusal of Peabody, Houghteling & Co. to make payment? The general rule is, that the holder, in order to charge the drawer in case of dishonor, is bound to present the check for payment within a reasonable time and give notice to the drawer within a like reasonable time, otherwise the delay will be at his own peril. Story on Promissory Notes (sec. 493) lays down the rule, that if the payee or holder of the check receives it from the drawer in the same town or city where it is payable, he is bound to present it for payment on the next succeeding day after it is received; but where he receives the check from the drawer in a place distant

from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next day after it is received, and the person to whom it is sent will not be required to present it for payment until the next day after it has reached him in the regular course of mail. But the rule just spoken of only applies where, in the intermediate time between the drawing of the check and presentment, there has been a change of circumstances affecting the interests of the drawer in respect to the banker upon whom the check was drawn. Where there has been a change the rule is applied strictly. But Story (sec. 497) says: "The drawer is in no case discharged from his responsibility to pay the same unless he has suffered some loss or injury by the omission or neglect to make such presentment, and then only *pro tanto*. If the bank has failed or become bankrupt, he will be discharged to the extent of the loss he has sustained thereby." This court has laid down the same rule. Thus, in *Heartt v. Rhodes*, 66 Ill. 351, it is said (p. 354): "The want of due presentment or notice of the dishonor of a check does not discharge the drawer unless he has suffered some loss or injury thereby. This is one point of difference between a check and a bill of exchange." And in *Stevens v. Park*, 73 Ill. 387, it was held that by failing to give notice to the drawer of a check of its non-payment within a reasonable time, the holder assumes the burden of showing that no damage has accrued to the drawer. In speaking further on this subject, Story (sec. 498) says: "If the bank or banker still remains in good credit and is able to pay the check, the drawer will still remain liable to pay the same, notwithstanding many months may have elapsed since the date of the check, and before the presentment for payment and notice of the dishonor. So if the drawer, at the date of the check or at the time of the presentment of it for payment, had no funds in the bank or banker's hands, or if, after drawing the check and before its presentment for

payment and dishonor, he had withdrawn his funds, the drawer would remain liable to pay the check notwithstanding the lapse of time."

Under the law as laid down in the authorities cited, it is plain the drawers of the check, Bowes Bros., are liable for the amount thereof. From the facts as found by the Appellate Court it appears the check was presented to the bankers upon whom it was drawn on the date it was issued, and again on the next business day thereafter, and again a week later, which was the last of June, 1892. It was again presented July 17, and also two weeks after that date, when payment was refused because the bankers, Peabody, Houghteling & Co., had paid all the money out belonging to the drawers of the check. From the facts as found there was no improper delay in presenting the check for payment. The drawers of the check were not notified until August 4, 1892, that payment was refused, but the delay will not bar a recovery here. The bankers upon whom the check was drawn did not fail nor were they financially embarrassed. The drawers, therefore, sustained no loss which could defeat a recovery. Indeed, the fund in the hands of Peabody, Houghteling & Co., placed there by the drawers of the check for its payment, was drawn out in subsequent checks which they issued to other parties. The drawers themselves were thus guilty of a manifest wrong in withdrawing the funds which they had placed in the hands of the banker for the purpose of paying the check in question, and it would now be an act of great injustice to allow them to defeat judgment on the check, as their wrongful act prevented payment by the bankers on whom it was drawn.

Under the facts as found by the Appellate Court we are of opinion the bank was entitled to judgment. The judgment of the Appellate Court will therefore be reversed and the judgment of the Superior Court of Cook county will be affirmed.

Judgment reversed.

PHILO N. BAXTER

v.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO.

Filed at Ottawa January 19, 1897.

1. CARRIERS—*carrier may reasonably limit time for claiming damages.* A common carrier, by contract with the shipper fairly entered into, may reasonably limit the time and manner in which claims for damages for injury to consignments shall be made.

2. SAME—*provision as to time for claiming damages is collateral to main contract.* A provision in a stock contract that the shipper, "as a condition precedent to his right to recover damages for loss or injury to stock, shall give notice in writing of his claim to some officer," etc., is collateral to the main contract.

3. SAME—*failure of shipper to aver compliance with collateral provision taken advantage of by demurrer.* The failure of a shipper declaring on an entire contract of shipment to aver compliance with its collateral provisions should be taken advantage of by demurrer, and cannot be made the basis of a motion to instruct for defendant.

4. SAME—*reasonableness of requirement as to method for claiming damages depends on the particular facts.* Whether a provision of a shipping contract prescribing the time and method for the shipper to make his claim for damages is reasonable, depends upon the facts and circumstances surrounding the contracting parties in each case.

5. SAME—*construction of provision prescribing method for claiming damages when shipment ends on carrier's line.* When a shipment terminates upon the forwarding carrier's line, a shipper seeking to avoid a condition of his contract prescribing the time and method for his claiming damages has the burden of proving that compliance with its terms is impracticable or unreasonable.

6. SAME—*requirement as to method for claiming damages construed, when shipment ends on connecting line.* When a shipment terminates on a connecting line, the forwarding carrier, seeking to defeat a recovery of damages because the shipper failed to file his claim with its officer or nearest station agent, must show that it had an authorized officer or agent near the place of delivery, whom the shipper could have found by exercising reasonable diligence.

Baxter v. L., N. A. & C. Ry. Co. 64 Ill. App. 130, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

BULKLEY, GRAY & MORE, for appellant.

GEORGE W. KRETZINGER, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellant sued appellee in the circuit court of Cook county for a failure to safely carry certain live stock from Chicago to Richmond, Va., under a contract of shipment evidenced by three receipts in writing, dated September 28, 1891, signed by the agents of the respective parties. At the close of plaintiff's evidence the defendant made the following motion: "Defendant moves the court to instruct the jury to return a verdict for the defendant, because the plaintiff has failed to allege or prove compliance on his part with an express provision contained in the contract sued on, requiring him to make his claim for damages in writing, in the manner and within the time in said contract provided, and that no such claim was made in writing by the plaintiff at any time before the commencement of this suit, or by any one on his behalf, and no claim whatever, as required in this portion of the contract, is averred in the declaration or shown by the evidence." After hearing the argument the motion was sustained and the jury instructed to return a verdict for the defendant, and this being done, judgment was entered against the plaintiff for costs of suit. The Appellate Court having affirmed that judgment, this appeal is prosecuted.

The provision in the contract on which the motion was based is as follows: "And for the consideration before mentioned the said party of the second part further agrees, that, as a condition precedent to his right to recover any damages for loss and injury to said stock, he will give notice in writing of his claim thereof to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, and from the place of

delivery of the same to said party of the second part, and before such stock is mingled with other stock." There is no allegation in the declaration of compliance with this provision nor of excuse for failure to do so, neither was any direct proof of such compliance or excuse offered upon the trial, but plaintiff's sole reliance was and is that said condition is unreasonable, and therefore void. The defendant's contention is, that while the plaintiff might have declared against it upon its common law liability, and insisted upon the invalidity of this condition, yet, having elected to declare in assumpsit upon the contract, he was bound to treat it as a whole, and is concluded by this as well as all other terms and conditions therein agreed upon; also, that having himself offered the contract in evidence he cannot now be heard to question the validity of any part of it.

It is the settled law, at least in this State, that a common carrier, by contract with the shipper fairly entered into, may limit the time within which claims for damages for injury to the goods shipped shall be made, provided the time and conditions made in the requirement are reasonable. Thus, it was held in *Black v. Wabash, St. Louis and Pacific Railway Co.* 111 Ill. 351, that a condition in a contract of shipment that any claim for loss or damage should be made in writing, etc., and delivered to the general freight agent of the company at St. Louis within five days from the time the stock was removed from the cars, was a reasonable and valid condition,—and this case, with others, is relied upon as sustaining the reasonableness of the condition here under consideration. The first question, however, to be determined upon the argument of counsel is, could the plaintiff below, appellant here, in view of his declaration and proof, raise the question of reasonableness and validity of the condition named.

It is said by Hutchinson in his work on Carriers (sec. 574): "So, if the plaintiff sue upon the contract, he must

state the whole of it. If, for instance, there are embodied in it limitations of the liability of the carrier, they must be stated." And illustrations are there given of the application of the rule. In the following sections he states the reasons for requiring such particularity in the declaration, but in section 756 says: "But a mere collateral provision, distinct from that portion of the contract which qualifies the liability of the carrier, and which contains 'the entire consideration for the act and the entire act which is to be done,' need not be stated,—as, for instance, a provision which recites only the manner in which the damages shall be liquidated after a right to them has accrued by a breach of the contract, or a notice that the carrier was not to be liable beyond a certain amount unless the goods were entered and paid for as being above that value. A provision of the former kind would be merely collateral to the main contract, which would be to carry the goods, and the former would be no part of the express contract to carry, although it might have the effect of the contract in estopping the owner of the goods from claiming a greater sum,"—citing *Clark v. Gray*, 6 East, 564. And he further says: "And such words would be a condition in the contract that unless demand or claim were made for the loss within a certain time after its occurrence, or after the date of the shipment, the liability of the carrier should cease."

[We understand that *Wedsell v. Dinsmore*, 4 Daly, 194, *Adams Express Co. v. Loeb & Bloom*, 70 Ky. 501, and the text quoted from Lawson on Contracts of Common Carriers, (sec. 354,) cited by counsel for appellee, are not in conflict with the rule thus announced. In the first case, speaking of the contract of shipment offered in evidence, the court said: "If it is to be used at all as an instrument of evidence on his part it must be taken all together, and the contract collected from all that is contained in it,"—that is to say, all the terms of the agreement which constitutes the contract of shipment as to its terms and

limitations. But it does not follow that mere collateral provisions, as this is termed, must be either pleaded or considered in determining the contract. In the Kentucky case the decision turned upon the refusal of the trial court to instruct the jury that if the parties agreed that the company was not to be liable unless the loss was caused by fraud, etc., before plaintiffs could recover they must prove the fraud, and the court said, speaking of a special contract of shipment: "That contract is made the foundation of appellees' action. They sue upon it and make it a part of their petition, and, so far from there being any allegation that it was not fairly made or that it was obtained by duress, imposture or delusion, it is fully recognized by appellees as obligatory, and made the basis of their recovery in this action. By this special contract the appellant's responsibility as common carrier, under the rules of the common law, was relaxed, and under the rulings of this court in *Adams Express Co. v. Nock*, 2 Duvall, 562, in the absence of any allegations calling in question its fairness or binding force, it must be regarded as obligatory." It was accordingly held that the refusal of the instruction was reversible error. But there, it will be seen, by the terms of the contract the liability for damages was limited to injury or loss caused by fraud, the question of fraud entering into the contract of shipment limiting the liability of the carrier. And so it will be seen that the cases referred to by Lawson in section 254, *supra*, are those in which the question is whether the shipper assented to the exemption under which the carrier seeks to escape liability.

The condition here relied upon by the defendant to defeat plaintiff's action is not that under the terms of the contract he had no right to recover damages, but that his right of action for such damages is defeated because of a failure to give notice and claim them within a certain time. In other words, the reliance upon this condition presupposes that damages have been sustained

within the terms of the contract of shipment, but that by the provisions of this mere collateral requirement they cannot be recovered. But the declaration in this case declares upon the contract, and even if it ought to be held defective in not averring compliance with the condition, that defect should have been taken advantage of by demurrer, and could not, under any recognized rule of practice, be made the basis of a motion to instruct the jury to find for the defendant; and so the question here must be, was the plaintiff conclusively bound by this provision merely because he offered the whole contract in evidence? His position is, that that part of the contract is unreasonable and therefore void, and if, under all the proofs submitted, including the various terms of the contract, it should be so treated, manifestly he is not bound thereby.

The question then remains, is the provision void for unreasonableness? It appears from the authorities generally on this question, that it must be determined from all the facts and circumstances of each particular case, and hence decisions are found holding substantially the same provision valid under one state of facts and invalid under another and different state of facts. The case of *Black v. Wabash, St. Louis and Pacific Railway Co. supra*, and cases cited in 11 Ill. App. 465, with others, are relied upon by counsel for appellee as sustaining the provision. It will be seen that in the *Black case*, and many of the others so relied upon, the carriage was by railroad companies over their own lines, and the requirement was to give notice to a particular agent, within a time fixed,—in the *Black case*, to the general freight agent in the city of St. Louis, within five days. In other cases, as 63 Mo. 314, and 12 Kan. 416, where the condition was that notice should be given at or before the unloading of the stock, the place of delivery was upon the line of the carrier itself, and in both those cases the court takes into consideration the facts and circumstances surrounding the

parties at the time. In the Kansas case it is said, after stating the facts: "Under these circumstances we cannot hold that the time when the notice was to be given was unreasonable. * * * Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen, and actually should not be discovered until the time for giving notice had expired."

If appears from the contract sued upon in this case, that the line of the defendant terminated at Louisville, Kentucky, and its liability is limited to damages resulting from neglect of duty on its own line, the place of destination being many hundred miles beyond that terminus and the carriage to be over connecting lines. It is fairly inferable from all the facts introduced upon the trial, if not from the contract itself, that the defendant had no station agent at or near the place of destination, or any officer at that place, and the question therefore is, is this provision, under the facts, so unreasonable and contrary to public policy as that it should be held unreasonable and void? "The place of destination above mentioned" was "Richmond, Virginia, Station," and hence the requirement, if valid, was, that before the animals were removed from that station, and before they were mingled with other stock, the shipper should give notice of his claim for damages. This, of course, to be of practical benefit to the defendant, meant more than a mere notice that damages would be claimed, but that the nature, character and amount of such damages should be stated, so that the defendant might inquire into and investigate the claim before the stock was removed and mingled with other stock. The evidence shows that upon arrival the horses were found to be in such a condition as that immediate attention and care were required to prevent additional and greater loss than had at that time been incurred; that it was necessary to feed, water

and care for the animals, and at as early a period as practicable remove them to pasture, there being no place at the station except the stock yard, in very bad condition, at which they could be kept. The particular person to whom notice was required to be given is not designated in the provision, but the shipper is left to hunt up, without any specific directions, "*some officer of said party of the first part, or its nearest station agent,*" thus making it his duty to keep the stock at the station, separate from other stock, until he could ascertain such officer or agent. As was said in *Smitha v. Louisville and Nashville Railway Co.* 86 Tenn. 198, of a stipulation identical with the one here in question: "The stipulation is uncertain and ambiguous. There is nothing by which it can be ascertained who is an officer, or what degree of agency or what relationship any individual must bear to the corporation to be one of its officers or make his position an officer of the company. It does not give the name of the nearest station, or use such language as, by reasonable construction, will designate a single agent to whom notice shall be given, or which is the nearest station of several in a city, or at what terminus, etc. These things were known to the corporation and should have been definitely set out, if they can be enforced at all. It is unreasonable in requiring the shipper to retain his stock at the place of destination or delivery, unmingled with other stock, until the written notice shall have been given. It is void because it undertakes to protect the carrier from losses occasioned by his own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to suit." The same doctrine is held in the case of *Coles & Co. v. Louisville, Evansville and St. Louis Railroad Co.* 41 Ill. App. 607, and the language of the court in that case is, we think, of forcible application to the facts in this case. It is true, the Supreme Court of Kansas, in the case of *Sprague v. Missouri Pacific Railway Co.* 34 Kan. 347, held otherwise, the provision in that case being

also identical with the one here under consideration and passed upon in the two cases last above cited. The facts, however, in that case were essentially different, in that there the carriage was over the line of the defendant, and, of course, its nearest station agent to the place of destination was easily ascertained. That court does not, however, and we think no court could intelligently, hold that such a provision is, in and of itself, reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract. Here the defendant is insisting upon a contract limiting its liability to its own line, and at the same time insisting upon the validity of a stipulation in that contract requiring the shipper, as a condition precedent to his right to recover such damages, to give notice of his claim at a place of destination upon another line wholly disconnected from its own, to one of its officers or its nearest station agent, no matter how remote from such place of destination.

We think, under these facts, that part of the provision which requires notice to *some* officer is unreasonable and uncertain, because it in no way indicates or designates what officer or where he may be found, and that the requirement that notice shall be given to the nearest station agent is impracticable of performance, because no means are given the shipper to ascertain who such agent is, or his station. The defendant had station agents along its line at various points from Chicago to Louisville. Which of these many agents would, under the terms of this provision, be regarded the nearest station agent would, it must be conceded, be a matter of very difficult ascertainment. It might be an agent anywhere along the line in the State of Indiana or Illinois who could be reached by the shortest line from Richmond station to that place. If not the nearest agent so ascertained, what agent is meant? Was it the station agent at Louisville, Kentucky, or at Chicago? There is nothing in the contract from which it can be so determined; and if the

provision was held reasonable and valid, and the shipper, before removing the stock or mingling it with other stock, had notified either of these agents, no reason is perceived why the defendant could not have successfully interposed the objection that other station agents along the line were nearer to Richmond station, and so the contention, if made, that the contract is susceptible of such meaning, is answered by the fact that the very contention itself only adds to the uncertainty and indefiniteness of the provision. The evidence also tends to show that the full amount of damages sustained could only be ascertained after reasonable time and opportunity had been given the owner of the animals to care for and restore them to a healthy condition.

We do not hold the condition, in and of itself, unreasonable, or that it would not be enforceable as a condition precedent to the plaintiff's right to bring his action, when applied to a shipment by a carrier over its own line, the place of delivery being upon such line, but we do hold that, as applied to the facts in this case, the condition is so unreasonable and impracticable of performance as to render it void.

It would seem that the apparent conflict between decisions bearing on the question may be reconciled upon the just construction, that when the shipper seeks to avoid such a condition as applied to a shipment over the carrier's own line, the burthen is upon him to prove such facts and circumstances as render compliance with its terms impracticable or unreasonable, but that when the carrier seeks to apply it to a shipment terminating on a connecting line, it must show that it had an officer or station agent at or near the place of delivery upon whom the required notice could have been served, and who could, by reasonable diligence on the part of the consignee, have been ascertained and found.

We see nothing in the facts of the case to authorize a recovery from the defendant for damages sustained upon

connecting lines, but the effect of the judgment of the trial court sustaining the validity of the condition not only relieved it from that liability, but also from recovery for damages claimed to have resulted on its own line.

We think the circuit court erred in sustaining the motion, and its judgment, and that of the Appellate Court, will accordingly be reversed and the cause remanded, with directions to proceed in conformity with the views herein expressed.

Reversed and remanded.

THE CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY CO.

v.

JAMES RYAN.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. INSTRUCTIONS—a court may refuse to give duplicate instructions. Where the court has already given a party a large number of instructions which cover fully all questions of law involved in the case, other instructions, though containing correct propositions of law, may be refused.

2. PLEADING—construction of pleadings is for the court. Upon demurrer to a plea of the Statute of Limitations alleging that certain additional counts filed by plaintiff state a different cause of action from that set forth in the original declaration, the question of the identity of the causes of action set forth in the different pleadings is for the court, and not the jury.

3. RAILROADS—duty of company to protect persons who must cross track to board waiting train. Passengers obliged to cross railroad tracks to board a train standing at a station have a right to suppose that the railway company will regulate the movements of its trains on the tracks to be crossed with due regard to their safety.

C., St. P. & K. C. Ry. Co. v. Ryan, 62 Ill. App. 264, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

GARDNER & MCFADON, for appellant.

DUNCAN & GILBERT, for appellee.

Per CURIAM: The brief and argument filed by appellant in the Appellate Court, with but a slight addition, have been filed in this court. We have carefully examined the argument and the points relied upon to reverse the judgment of the Appellate Court, and after a careful consideration of the entire record are of opinion that the judgment of the Appellate Court was right.

The alleged discrepancy between the facts as found in the statement of facts by the Appellate Court and the facts enumerated in the opinion we do not regard of any importance.

As to the objection that the court erred in refusing certain of appellant's instructions. It will be found upon an inspection of the record that no instructions were given for plaintiff, while the court gave fourteen instructions for the defendant. These instructions covered so fully all questions of law involved in the case that the giving of others was not required, and if the refused instructions did contain correct propositions of law (which is not conceded) the court did not err in refusing them.

The judgment of the Appellate Court will be affirmed, and the opinion of that court will be adopted as the opinion of this court. It, with the statement of facts, is as follows:

"On and prior to August 3, 1891, the Chicago and Northern Pacific Railroad Company owned and operated a terminal railroad extending to a point west of the city limits of the city of Chicago, east across Ashland and Ogden avenues to Harrison street and Fifth avenue, in said city. This railroad, and the terminal facilities connected therewith, were under the exclusive control of the Chicago and Northern Pacific Railroad Company. The Northern Pacific company arranged the time-table for running all trains and fixed the rules and regulations under which all trains operated on said road were run.

"The Chicago, St. Paul and Kansas City Railway Company, prior to August 3, 1891, had obtained a lease from said Northern Pacific company, under which it had the privilege of operating its trains between an intersection with said railroad west of said city to the Harrison street depot. Its trains were operated upon a time-table furnished it by the Northern Pacific company, and also under certain rules, and under a block system established on the said railroad. On the 3d day of August, 1891, the Northern Pacific company was operating a train which was due at Ogden avenue station to take on suburban passengers at 4:29 o'clock P. M. It was, however, five minutes behind time, and did not reach said station until thirty-four minutes after four o'clock, and was either just stopping or had just come to a stop when the accident happened to plaintiff, as complained of in this case. The plaintiff had reached the station at 4:29 P. M., before the arrival of the last named train that day, purchased a ticket for the said Northern Pacific train, and then went in a south-westerly direction, proceeding towards the rear of the train, for the purpose of taking the rear car of such train. The train of the Kansas City company had left the Harrison street depot on that day at the time fixed in the time-table of said Northern Pacific company, namely, 4:20 o'clock P. M. The train was run upon the time fixed in the said time-table, and was due to pass the Ogden avenue station on said railroad at 4:34 o'clock P. M. The movement of trains approaching Ogden avenue station was controlled and directed by a block signal station, that east of the station being located about 380 feet east of the Ogden avenue station. The railroad makes a rapid curve after leaving Ogden avenue station going west under the viaduct on Ogden avenue, and a train coming from the west could not be seen at a distance of more than 150 feet west of Ogden avenue station. When the Kansas City train reached the block signal station east of said Ogden avenue station, the

signals displayed were two; one notified that the track was clear, that there was no obstruction and to proceed at full speed, and the other notified it that the depot was unoccupied. The engine of this train met the engine of the Northern Pacific train at a point immediately opposite the center of the Ogden avenue station. The plaintiff, in going to the Northern Pacific train, was facing south-west and away from the Kansas City train. He stepped upon the north track when the Kansas City train was right upon him. The engineer did all that he could to stop the engine, but the plaintiff was struck and thrown against the Northern Pacific train and injured. The plaintiff testified that he was familiar with the locality; that he used the trains from that depot from two to four times a day. He also testified that he knew the Kansas City train which struck him passed there every day about the same time, and that it passed without stopping.

"The defendants filed pleas of the general issue, and to the additional counts, filed more than two years after the accident, pleas of the Statute of Limitations. The pleas of the Statute of Limitations each contained the allegation that the causes of action set up in the additional counts were other and different than those set forth in the declaration originally filed. Demurrers to the pleas of the Statute of Limitations were sustained. Upon the trial the cause was dismissed as to the Northern Pacific Railway Company, a verdict being rendered against appellant, upon which there was judgment for \$6000.

"WATERMAN, J.: It is insisted that the demurrer to the pleas of the Statute of Limitations was improperly sustained, and that the defendant was entitled to have the question of whether the cause of action set up in the additional counts was other and different from that set up in the declaration first filed, tried by a jury, because, as is urged, the allegation that the said causes of action were other and different from those set up in the declara-

tion first filed presented a question of fact for the determination of the jury.

"A party cannot, by his pleading, determine the character of his adversary's pleas, nor is the construction of pleadings a thing to be submitted to a jury. The various counts of plaintiff's declaration were before the court, and it was for the court, upon an examination of such counts, to decide whether the cause of action set up in the additional counts was the same as that set forth in the declaration first filed, or other and different. In the case of *Phelps v. Illinois Central Railroad Co.* 94 Ill. 548, (4 Ill. App. 238-243,) it does appear that the plea of the Statute of Limitations contains the allegations relied upon here, and that a demurrer to such plea was wrongly sustained, but there is no intimation that it was because such allegation was in the plea that the demurrer thereto should have been overruled. On the contrary, the reason for the decision is not that a jury should have been allowed to determine as to the truthfulness of such allegation, but because, as the Appellate and Supreme Courts each find, the cause of action set up in the new counts was other and different from that declared upon in the first count.

"We think that the court below properly held in this case that the cause of action set up in the additional counts was the same as that set forth in the declaration first filed. Each count appears upon its face to be but a different way of stating the cause of action originally declared upon. The demurrer to the pleas of the Statute of Limitations was therefore properly sustained. *Dickson v. Chicago, Burlington and Quincy Railroad Co.* 81 Ill. 215; *Mitchell v. Milholland*, 106 id. 175; *North Chicago Rolling Mill Co. v. Monka*, 107 id. 340; *Blanchard v. Lake Shore and Michigan Southern Railway Co.* 126 id. 416; *Stearns v. Reidy*, 33 Ill. App. 246; *Fish v. Farwell*, 54 id. 457; *Swift v. Foster*, 55 id. 280; *Illinois Central Railroad Co. v. Campbell*, 58 id. 275.

"It is true that appellee did not sustain to appellant the relation of a passenger. It was not bound to exer-

cise the highest diligence to insure his safety. His right to go where he was proceeding and to be where he stood when struck was certainly the equal of that of appellant. All the world, corporations and individuals, owe a duty to strangers. No one can be reckless as regards the welfare of any with whom he may be brought into contact. Although the running arrangements for trains upon this road may have been made by the Northern Pacific Railway Company, yet appellant was a voluntary agent in acceding thereto. For reasons satisfactory to itself it ran its train as it did at the time of the accident. Appellant knew that for its train, while running at a rate of twenty-five miles an hour, to pass at a station a train there waiting to receive passengers was very dangerous to persons who might be crossing appellant's tracks to go to the waiting train. It knew that due regard for the rights and safety of intending passengers of the Northern Pacific Railway Company required that its stations should be approached and passed with care. The engineer of appellant's train, seeing the Northern Pacific train waiting at the station, had notice that persons were quite likely at such time to be crossing the tracks, as passengers were compelled to do in order to go to and from the trains of the Northern Pacific. Appellant at some time seems to have recognized these things by one of its rules in force at the time of the accident, which was as follows: 'Trains on double tracks, moving in either direction, must not under any circumstances pass a station without stopping at which a passenger train from an opposite direction is standing, receiving or discharging passengers. In approaching stations where a passenger train is due or past due, where the view is not clear, trains must be under perfect control, so as to stop if necessary before arriving at the station. The speed of trains must be so regulated that when passenger trains are on time they will meet between stations on double tracks.' Had this rule been obeyed the accident would not have happened.

"Was appellee exercising ordinary care? He had a right to suppose that appellant would substantially observe its own rule above set forth,—not that appellee knew of the existence of such rule, but that it is merely a statement of what a fair regard for the rights of those having occasion to go to or from the passenger trains of the Northern Pacific road required. There was a curve in the tracks near the place of the accident; so that we are unable to tell, from the evidence, at what distance in the direction appellant's train was coming appellee could see the approaching engine. He says that he did not see it. Ordinary care is such care as reasonably prudent and cautious persons exercise under like circumstances. (*Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson*, 120 Ill. 587; *Chicago and Alton Railroad Co. v. Adler*, 129 id. 335.) Reasonably prudent people do frequently and habitually cross railroad tracks to go to a passenger train waiting at a station to receive passengers. The reasonably prudent and cautious person does not always take care to have knowledge of and bear in mind the times at which the trains of roads he is not accustomed to use pass the stations of the road which he does make use of. The ordinarily prudent person does, perhaps, look ere he crosses any railroad track to see that no train is approaching upon it; but in the present case it does not appear that it was because of a failure to so look that appellee was injured. As the stations and tracks of railroads are constructed in this country it is impossible in many cases for passengers to do otherwise than cross railroad tracks. Such was the case at Ogden avenue. Such was known to appellant, and it was its duty to so govern the movements of its trains as not to endanger the life of all who had occasion to cross at this point the tracks which it made use of.

"The jury were fairly instructed, and the judgment is not for an excessive amount. It is therefore affirmed."

Judgment affirmed.

MRS. B. GRAHAM *et al.*

v.

ANNIE M. SADLIER.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. LAW AND FACT—*construction of a written instrument is for the court.* Whether a written contract creates the relation of principal and agent between the parties thereto, or that of vendor and purchaser, is a question of law for the determination of the court.

2. PRINCIPAL AND AGENT—*written authority of agent cannot be enlarged by proof of usage.* Where a written contract authorizes an agent to do certain things, the power to do other things not mentioned in the contract of agency cannot be established by proof of usage among other like agents.

3. CONTRACTS—*letters leading up to a written contract are merged therein.* Where parties reduce previous negotiations to a written contract, such contract is the final consummation of their negotiations and the exact expression of their purpose, and all letters containing such negotiations are merged therein.

Graham v. Sadlier, 60 Ill. App. 522, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANCIS ADAMS, Judge, presiding.

JOHN E. DALTON, and SAMUEL J. LUMBARD, for appellants.

LAWRENCE M. ENNIS, (ENNIS & COBURN, of counsel,) for appellee.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

This is an action of assumpsit, brought by appellee against appellants to recover a balance claimed to be due on account of school books sold by appellee to appellants. The declaration contains the common counts only; and the plea was the general issue. The account

165	95
81a	321
165	95
98a	1580
165	95
201	1614
165	95
204	1154
165	95
110a	*100
110a	*101
165	95
111a	*618
165	95
114a	*649

sued upon is very long, and contains numerous items of debits and credits extending through a period of more than two years. The first trial of the case resulted in a verdict and judgment in favor of appellee for \$2370.91. Upon appeal to the Appellate Court this judgment was reversed, and the cause was remanded for another trial. The opinion of the Appellate Court, thus reversing and remanding, is reported as *Graham v. Sadlier*, 46 Ill. App. 440. The second trial before the court and jury resulted in a verdict and judgment in favor of the appellee for the sum of \$1967.57. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance.

All the questions of fact are settled by the judgment of the Appellate Court.

It is assigned as error, that the court so far modified one of the instructions asked by the appellants, as to tell the jury that a certain contract introduced in evidence and dated July 1, 1886, between the appellee and the appellants did not make the appellants agents of the appellees. We see no error in the instruction. The contract was in writing, and its construction was a matter for the court. If the question was fairly involved as to whether the language of the contract created the relation of principal and agent or the relation of vendor and purchaser between appellee and appellants, it was the province of the court to so construe the contract as to determine whether the goods shipped to the appellants were shipped to them as agents of the appellee, or as her vendees. It is not claimed, that the court did not correctly construe the contract; for counsel for appellants say in their brief: "That the literal translation or reading of that contract did not prove an agency is too clear for serious contention." But the objection seems to be, that it was not left to the jury to say whether or not an agency was thereby created. Such is not the law, as applicable to written contracts generally, nor as appli-

cable to a written contract of the character of the one here under consideration.

"What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. * * * They (the court) give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take." (2 Parsons on Contracts,—8th ed.—marg. p. 492). In approving of this doctrine it was said by PARKE, B., in *Neilson v. Harford*, 8 M. & W. 806: "Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually."

So, this court held, in *Chickering v. Bastress*, 130 Ill. 206, that the question whether a written agreement between parties constituted a contract of bailment of goods, or was designed to cover a sale on which the vendor's lien might be preserved, was a pure question of law, to be determined by the court upon a construction of the instrument, fairly considering all its provisions, with the view of finding therefrom what was the real intention of the parties. (See *Hervey v. R. I. L. Works*, 93 U. S. 664; *Murch v. Wright*, 46 Ill. 487; *Heryford v. Davis*, 102 U. S. 235.)

Where written authority to an agent confers power upon him to do certain things, power to do certain other things thereunder cannot be established by showing a usage to that effect among agents of the like sort, parol evidence not being admissible to control or enlarge the language of the written authority, and the rule being that "the construction of a written instrument, whether mercantile or otherwise, is for the court, and not for the jury." (Story on Agency, 9th ed. sec. 63, note 4; Lloyd's Notes to Paley on Agency, (3d ed.) p. 198; *Gibney v. Curtis*, 61 Md. 192).

Whether a contract creates an agency or provides for a conditional sale, and whether it creates the relation of

principal and agent or the relation of vendor and purchaser, are questions of construction to be determined by the court. (*Bayliss v. Davis*, 47 Iowa, 340; *Eldridge v. Benson*, 7 Cush. 483; *Robinson v. Easton*, 93 Cal. 82).

It is also claimed, that the trial court erred in refusing to admit in evidence two letters dated respectively February 24, 1885, and September 28, 1885. We cannot see that these letters were material, as they referred to transactions prior in date to any of the items in the bill of particulars attached to the declaration; and so far as they had reference to matters affected by the contract of July 1, 1886, their contents were merged into and supplanted by that contract. When parties, after whatever previous preparation, reduce their agreement to writing, such written agreement is "the final consummation of their negotiation, and the exact expression of their purpose." What has preceded it, if not incorporated into it, is regarded as intentionally rejected. (2 Parsons on Contracts,—8th ed.—marg. p. 548).

It is further urged, that the trial court erred in permitting one of the witnesses called upon the rebuttal, to say that he had seen boxes of goods that had been shipped to appellants, or were about to be shipped away by them, standing on the sidewalk in front of their store, open, and with some of the goods resting on the boxes and some of them out of the boxes, and that these goods would be thus left in this condition. The testimony was not of much importance, but, as appellants claimed a shortage and that some items of goods were charged to them which they did not have, it may have tended to show a loss of some of the books by a too careless exposure of them. As, however, it abundantly appears from the testimony that the appellants were allowed about all the credits claimed by them, it could not make any difference what particular cause gave rise to the demand for such credits. Owing to the strenuous insistence of counsel for appellants that the verdict has done them "a most substantial

wrong," we have read the abstract of the testimony very carefully, and we are satisfied that the evidence justifies the verdict, and, indeed, that it would have warranted a larger verdict.

The judgments of the Appellate and circuit courts are affirmed.

Judgment affirmed.

HENRIETTA H. STARRETT

v.

THOMAS H. GAULT *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. **PARTIES**—*misjoinder of plaintiffs in actions ex contractu is fatal to recovery.* In actions *ex contractu* there must not be too few or too many parties plaintiff, and if there be, the misjoinder is fatal to a recovery.

2. **SAME**—*plaintiffs suing jointly in assumpsit must show joint interest in contract.* Attorneys, not partners, employed by a client at different times, under separate contracts, cannot join in a suit against their client for breach of their contracts, although they may have assisted each other in transacting some of the client's business.

3. **SPECIAL FINDINGS**—*when judgment should be given on special findings.* Where one of the defenses to a suit to recover for professional services under an alleged joint contract is a misjoinder of plaintiffs, judgment should be given for the defendant upon the jury's finding specially that the plaintiffs' employment was several, notwithstanding the jury returns a general verdict for plaintiffs.

Starrett v. Gault, 62 Ill. App. 209, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

H. T. & L. HELM, for appellant.

THOMAS H. GAULT, and J. MCKENZIE CLELAND, (C. M. HARDY, of counsel,) *pro sese*.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellees sued appellant for professional services rendered and costs advanced by them as her attorneys. She pleaded the general issue and set-off, and there was a trial resulting in a judgment for appellees for \$1500 and costs. That judgment the Appellate Court affirmed.

One of the defenses at the trial was, that there was a misjoinder of plaintiffs, and that their employment as attorneys was several, and not joint. Plaintiffs proved that upon the death of defendant's husband she employed the plaintiff Thomas H. Gault as her attorney, and at his request she also employed the plaintiff J. McKenzie Cleland a few days later to assist Gault. The services in question were rendered in the administration of her husband's estate in the probate court, and in litigation in other courts concerning her personal interests. Plaintiffs were not partners and had no business relations. Cleland was a partner with another attorney, and the offices of that firm were connected with the office occupied by Gault. In performing the services for defendant they sometimes acted separately and sometimes both took part. She had two other attorneys, who acted for her in some of the suits and assisted in litigation with one or both of the plaintiffs. Moneys were advanced from time to time by the plaintiffs, separately, out of their own individual means. There was no joint fund held or used for such advances nor was there any community of interest in the money advanced. She paid, at different times, different sums of money to each of them, for which separate individual receipts were given. The jury returned a general verdict for plaintiffs, assessing their damages at \$1500, and also the following special findings:

1. "Was the plaintiff Gault individually employed by the defendant, generally and specially, for all the professional services in the management of the business affairs

of the defendant which have been presented in this case as having been performed by both the plaintiffs, and did he render his services in such matters under such original employment?—A. Yes.

2. "Was the plaintiff Cleland expressly or impliedly employed, by a subsequent and distinct agreement, to assist in the performance of the professional services aforesaid, and if so, was he employed by the defendant or by the plaintiff Gault?—A. Yes; by the defendant."

The defendant thereupon moved the court that judgment be entered in her favor upon the special findings, but the motion was denied, and the court, after overruling a motion for a new trial, entered judgment on the general verdict.

If the conclusion of law from the special findings is that the damages sued for resulted from a breach of contracts made with the plaintiffs severally, and not a joint contract with both, then the defendant's motion should have been sustained. A contract with plaintiffs jointly is a different thing from two contracts with them severally. The general verdict was a finding that the alleged joint contract had been proved, and special findings that there was not such contract would be irreconcilably inconsistent with such general verdict. Neither of the plaintiffs would have any right to sue on a contract in which he had no legal interest, and it would make no difference that one or the other of them had a legal right as to each of the different charges or advances, so that in combination their rights would cover all. If plaintiffs sue as joint contractors they must show a joint interest in the contract. (*Snell v. DeLand*, 43 Ill. 323.) In that case it was further said (p. 326): "It is a rule as old as the science of pleading itself, that in declaring in actions on contracts there must not be too few or too many plaintiffs. If there be, it is fatal to a recovery." Nor is this defense of a merely technical character. Proof of several contracts with the plaintiffs would not support

the allegations of the declaration, and the rights and obligations of the parties would be different.

According to the first special finding the contract with Gault was made with him individually, for all the professional services proved, and he rendered his services under that contract. Cleland had no interest whatever in that contract by its terms, and it is not claimed that he gained any by virtue of any partnership or relation with Gault. He had no interest in or relation to the undertaking of Gault to render his services for defendant. From the second special finding it results that the plaintiff Cleland was subsequently employed by a separate contract with defendant to assist in the performance of the professional services rendered, and Gault was not in any manner concerned in that contract. It gave Cleland no interest in Gault's contract made a few days before. Neither would be affected by the failure of the other to perform his contract nor by the manner or degree of skill with which he might perform it. The fact that Cleland was hired to assist Gault would not give either any interest in the contract of the other. It would scarcely be claimed that the employees of a common master could sue jointly merely because engaged in the same work and assisting each other in its execution. Cleland assisted, as was to be expected, because that was what he was hired to do, but mere association in a common task did not create a joint contract. That fact would not enable defendant to hold either liable for the deficiencies or neglects of the other. The fact that defendant filed a plea of set-off cannot affect the question.

The special findings were inconsistent with the general verdict, and it was error to deny defendant's motion.

The judgments of the Appellate Court and circuit court will be reversed, and the cause will be remanded to the circuit court for another trial.

Reversed and remanded.

THE AMERICAN EXCHANGE NATIONAL BANK

v.

THE LORETTA GOLD AND SILVER MINING COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

1. BANKS—*special deposit cannot be used by bank for other purposes.* A deposit of a fund with a bank "for credit of account" of its correspondent, "for the use" of a designated party, is a special deposit with a designated beneficiary, and the receiving bank becomes the special depository of the fund, to deal therewith in strict accordance with the terms of the deposit.

2. SAME—*special deposit, the purpose of which is defeated, is subject to depositor's disposal.* Where a fund is deposited with a bank to be transmitted to its correspondent for the use of a designated beneficiary, the failure of the correspondent bank before transmission of the fund defeats the purpose of the deposit, and the receiving bank must hold the same subject to the depositor's order, and can not apply it to its own account with the insolvent bank.

3. SAME—*revocable book entries do not operate to transfer title to funds which are the subject thereof.* Book entries made by a bank, on notice from a party that he had deposited with its correspondent a fund for the use of one of its customers, crediting the amount to such customer and debiting the same to its correspondent, are provisional, merely, and do not operate to transfer the title to the fund to the bank before receipt, either of the fund itself or notice from its correspondent authorizing the entries.

4. SAME—*deposit not fully received before formal insolvency may be recovered by depositor.* A deposit which has been kept separate and not fully received by a bank before formal insolvency may be recovered by the depositor in preference to other creditors.

Am. Ex. Nat. Bank v. Loretta Mining Co. 60 Ill. App. 626, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is an action of assumpsit brought by appellee against appellant to recover \$750.00 deposited by appellee with appellant under the circumstances hereinafter stated. The declaration contained the common counts only, and the plea was the general issue. The case was

165	108
174	463
73a	675
73a	678

tried before the court without a jury upon an agreed state of facts.

Plaintiff requested the court to hold the following proposition of law:

"The court holds, as a matter of law, that upon the facts admitted and agreed upon in this case plaintiff is entitled to recover."

Defendant requested the court to hold as follows:

"That upon the facts admitted and agreed upon in this case the finding upon the issues therein must, as a matter of law, be for the defendant."

The court refused the proposition tendered by the plaintiff and held the proposition tendered by the defendant, and thereupon found the issues for the defendant, and, after overruling a motion for new trial, rendered judgment for the defendant, and against the plaintiff for costs. Upon appeal to the Appellate Court, the latter court reversed the judgment of the circuit court, and entered judgment for \$750.00 and costs in favor of the present appellee, and granted a certificate of importance. The present appeal is from the judgment of the Appellate Court.

The agreed statement of facts is as follows:

"Plaintiff is a corporation organized under the laws of Wisconsin, and owned and operated a mine at Barker, Montana. M. J. Dunn was plaintiff's general superintendent at Barker. Defendant is a banking corporation organized under the National Banking act, and does business at Chicago, Illinois.

"On July 21, 1893, plaintiff mailed at Milwaukee, Wisconsin, to defendant at Chicago, Illinois, a letter enclosing a draft, in the form of a draft drawn by one bank upon another, payable to the order of defendant, for the sum of \$750. Copy of letter enclosing draft is as follows: 'Enclosed please find draft for \$750, for credit of account Merchants' National Bank, Great Falls, Montana, for the use of M. J. Dunn, our superintendent at Barker, Mon-

tana.' On July 21, 1893, plaintiff telegraphed said Dunn at Barker, Montana, as follows: 'Have deposited your account \$750.' On the same day plaintiff telegraphed the Merchants' National Bank of Great Falls, Montana: 'Have deposited \$750 M. J. Dunn's account.' Prior to May 10, 1893, and up to and including the failure of the Merchants' National Bank, M. J. Dunn kept a bank account with it in his own name, and kept in said account, without the knowledge or consent of plaintiff, but with the knowledge of said Merchants' National Bank, funds belonging to the plaintiff. Said \$750 was to be used by Dunn as plaintiff's superintendent and on plaintiff's account. Said Merchants' National Bank, on receipt of the foregoing telegram from plaintiff to it on July 21, 1893, credited said \$750 to said Dunn's account. The particular manner in which the deposit was made was unknown to the plaintiff, but the Merchants' National Bank knew that said fund belonged to plaintiff.

"On July 21, 1893, the Merchants' National Bank charged said \$750 on its books to defendant's account. The letter and draft for \$750 were received by defendant at Chicago on July 22, 1893, and no other or different instructions regarding said draft were given to it by plaintiff. Plaintiff was not, at the time of the receipt of the draft by defendant, nor has it since been, indebted to defendant in any sum whatever. Defendant, for more than a year prior to July 23, 1893, was the correspondent at Chicago of said Merchants' National Bank, and said last named bank kept an account current with the defendant. Said sum of \$750 was on July 22, 1893, credited generally to the account of the Merchants' National Bank on its books, but without the knowledge or consent of plaintiff. Said funds were never in fact forwarded by the defendant to the Merchants' National Bank or to Dunn, and on July 22, 1893, defendant, without the knowledge or consent of the plaintiff, mailed to said Merchants' National Bank a postal card advising said Merchants' National

Bank that it had credited its account with said \$750. Said postal card was not received by said Merchants' National Bank until after July 23, 1893.

"At the close of business on July 23, 1893, said Merchants' National Bank closed its doors and did not re-open them thereafter, and on the morning of July 24, 1893, said Merchants' National Bank went into the hands of the national bank examiner, pursuant to orders from the comptroller of the currency, and a receiver was subsequently appointed who is now winding up the affairs of said bank. Plaintiff demanded from defendant said sum of \$750 on July 26, 1893, and at divers times since. At the time of the receipt by the defendant of said \$750, and at the time of the failure of the said Merchants' National Bank, said bank was indebted to defendant in an amount largely in excess of \$750. Defendant has not paid to the plaintiff said sum of \$750, but has declined and refused to do so.

"On September 11, 1893, M. J. Dunn, without the knowledge, consent or authority of the plaintiff, filed with the receiver of the Merchants' National Bank a proof of claim as follows:—Affidavit of M. J. Dunn, that the Merchants' National Bank is justly indebted to him in the sum of \$756.63 on account of individual deposit; that said sum is due to him alone, and that he has given no assignment or endorsement of the same, and knows of no set-off or legal or equitable defense. (Sworn to before a notary public.) Said claim has been allowed against said bank, but without the knowledge, consent, procurement or authority of the plaintiff. Said claim includes a balance of \$6.63, which on July 20, 1893, stood to the credit of Dunn, and also includes said sum of \$750 placed to the credit of said Dunn on July 21, 1893, on receipt of plaintiff's telegram above mentioned, all of which was unknown to plaintiff. Said claim includes the \$750 which plaintiff is seeking to recover in this case.

"On May 10, 1893, plaintiff sent by mail from Milwaukee, to defendant at Chicago, a bank draft in the form of drafts usually drawn by one bank upon another for \$2000, payable to its order and enclosed in a letter, as follows: 'Enclosed please find draft for \$2000, for credit of account of Merchants' National Bank, Great Falls, Montana, for use of M. J. Dunn, our superintendent at Barker, Montana.' On the same day plaintiff telegraphed Dunn: 'Have deposited your account \$2000,' and telegraphed the Merchants' National Bank: 'Have deposited \$2000 M. J. Dunn's account.' On May 10 the Merchants' National Bank credited said \$2000 to Dunn's account and on the same day charged the same to defendant's account. Said Merchants' National Bank knew that said Dunn was the plaintiff's superintendent, and that said fund belonged to plaintiff and was to be used in plaintiff's business. Defendant received said draft for \$2000 on May 11, 1893, and placed the same to the credit of the Merchants' National Bank generally, without the knowledge or consent of plaintiff, and on May 11 advised the Merchants' National Bank, by letter, of said credit, without the knowledge or consent of the plaintiff.

"On June 2, 1893, plaintiff mailed to defendant from Milwaukee a draft in the form drawn by one bank upon another, payable to its order, for \$1700, with letter of advice, as follows: 'Enclosed please find draft for \$1700, for credit of account of the Merchants' National Bank, Great Falls, Montana, use of M. J. Dunn, our superintendent at Barker, Montana.' On June 2, 1893, plaintiff telegraphed Dunn: 'Have deposited your account \$1700,' and on the same day telegraphed the Merchants' National Bank: 'Have deposited \$1700 M. J. Dunn's account.' The Merchants' National Bank received said telegram from plaintiff on June 2, 1893, and on the same day credited the said \$1700 to the account of Dunn, but the particular manner in which said deposit was made was unknown to plaintiff. On the same day the Merchants' National Bank

charged said \$1700 on its books to defendant's account. Defendant received said last mentioned letter on June 3, 1893, and without the knowledge or consent of the plaintiff credited the same generally on its books to the account of the Merchants' National Bank, and advised said bank of such credit by mail.

"On June 6, 1893, plaintiff mailed at Milwaukee, to defendant at Chicago, a draft for \$1100, enclosed in letter of advice, as follows: 'Enclosed please find draft for \$1100 for credit of account of Merchants' National Bank, Great Falls, Montana, use of M. J. Dunn, our superintendent at Barker, Montana.' On June 6, 1893, plaintiff telegraphed said Dunn: 'Have deposited your account \$1100,' and on the same day telegraphed the Merchants' National Bank: 'Have deposited \$1100 M. J. Dunn's account.' The Merchants' National Bank received said telegram on June 6, 1893, and credited said \$1100 to Dunn. On June 7, 1893, the defendant received said last mentioned letter and draft, and credited the same generally on its books to the account of the Merchants' National Bank without the knowledge or consent of plaintiff, and on June 7 advised the Merchants' National Bank, by letter, of such credit.

"On and prior to May 10, 1893, and up to and including the failure of the Merchants' National Bank, it had been agreed between plaintiff and said bank that when plaintiff should telegraph said bank that plaintiff had deposited any money for M. J. Dunn's account, said Merchants' National Bank should understand that such deposit had been made by plaintiff with defendant for the credit of the account of the Merchants' National Bank with defendant, for the use of M. J. Dunn, as plaintiff's superintendent, and that on receipt of any such telegram said Merchants' National Bank should, and in each instance did, at once place the amount mentioned in the telegram to the credit of said Dunn on the books of the Merchants' National Bank, and that the same at once became subject to the payment of said Dunn's checks; that such arrange-

ment between plaintiff and the Merchants' National Bank was made in order that any amount that plaintiff might send to defendant under said agreement might at once be credited to said Dunn's account on the books of the Merchants' National Bank and be at once available to check against.

"It is agreed that the court may draw any inferences of fact from the facts herein agreed to that a jury would be at liberty to draw from such facts if proved at the trial. Both sides reserve the right of appeal from such judgment as shall be entered in the premises, and the right to sue out a writ of error."

SWIFT, CAMPBELL, JONES & MARTIN, for appellant.

DEFREES, BRACE & RITTER, for appellee.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

Appellee sent to appellant a draft for \$750.00 saying: "Enclosed please find draft for \$750.00 for credit of account Merchants' National Bank, Great Falls, Montana, for the use of M. J. Dunn, our superintendent at Barker, Montana." The letter enclosing the draft notified appellant, that the money did not belong to the Montana bank, but that such money belonged to appellee, or to Dunn, its superintendent in Montana. The appellant, at the time it received the money, was the correspondent at Chicago of the Montana bank, and the latter bank kept an account current with appellant. When the appellant took the money of appellee into its hands, it became charged with the duty of transmitting it to the Montana bank for the use and benefit of appellee's superintendent, or of holding it subject to the order of the Montana bank acting in the interest and for the benefit of appellee. This duty it was under obligations to perform in strict accordance with its instructions. (*Judy v. Farmers' and Traders' Bank*, 81 Mo. 404; *United States Bank v. Mac-*

alister, 9 Pa. St. 475; *Parker v. Hartley*, 91 id. 465; *Bank of British North America v. Cooper*, 137 U. S. 473; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431). The deposit made by appellee with appellant was a special deposit for a designated beneficiary and could not be used or dedicated by appellant to any other purpose. Appellant having become the special depository of the fund was bound to retain it, until it was drawn out by the Montana bank for the use of appellee's superintendent. (*Cutler v. American Exchange Nat. Bank*, 113 N. Y. 593).

Instead of transmitting the fund to the Montana bank for appellee's use, or holding it subject to be drawn out by that bank for appellee's use, appellant, on the very day on which it received the fund, credited it, upon its books, generally to the account of the Montana bank, and, the Montana bank being indebted to it in more than the amount of the fund, the appellant subsequently refused to pay over the fund to appellee upon demand being made for it. Appellant thus applied a fund belonging to appellee to the payment of its own debt against the Montana bank. This it had no right to do, because the letter, transmitting the fund to appellant, informed appellant that the money belonged to appellee, and was merely to be credited to the Montana bank for the use of appellee. By accepting the fund under the terms named in the letter appellant became the depository of the fund for appellee's use, and took the money with notice that it was charged with such use. (*Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646).

The fund was sent by appellee from Milwaukee to appellant at Chicago on July 21, 1893, and was received by appellant at Chicago on July 22, 1893. On the latter day appellant mailed a postal card to the Montana bank, informing that bank that appellant had received the fund and had credited it to the account of the Montana bank. But the Montana bank suspended business at the close

of business hours on July 23, 1893, and never afterwards resumed business; on the morning of the next day, July 24, it was seized by the national bank examiner, pursuant to orders from the comptroller of the currency, and subsequently went into the hands of a receiver. It did not receive the postal, advising it of the credit of this fund to it by appellant, until after its failure. By the failure of the Montana bank, the purpose, for which the deposit was made, failed and could not be executed. It thereby became impossible for the Montana bank to receive the money in trust for the use of appellee, and for the appellant to transmit it to that bank for the use of appellee, or to hold it subject to the order or draft of that bank for appellee's use. It results that, inasmuch as the purpose of the deposit of the fund with appellant has become incapable of execution, appellant holds the fund to the use of appellee, and has become liable to repay it to appellee. (*Drovers' Nat. Bank v. O'Hare, supra; Cutler v. American Exchange Nat. Bank, supra*).

It is contended, however, that the entries by the Montana bank of a credit to Dunn, and of a charge against the appellant, for the amount of the fund after the Montana bank received notice on July 21, 1893, of the deposit of the money to Dunn's account in the appellant bank, made the Montana bank the owner of the credit given by appellant to that bank, and, therefore, that the Montana bank alone is entitled to sue appellant. The credit given by appellant was not to the Montana bank, but to that bank as trustee for the use of appellee or its superintendent. A deposit due to the Montana bank as trustee for the use of appellee could not be off-set against the Montana bank's private debt to appellant, (1 Morse on Banks and Banking, sec. 334), and, hence, the case must be looked at as though appellant was not a creditor of the Montana bank. As appellant had no right to pay its claim against the Montana bank with this fund which belonged to appellee, the fund is to be regarded as still

in the hands of appellant, unused and unappropriated. The question then is, whether the receiver of the Montana bank has the right to sue for the fund, or whether such right belongs to appellee.

It is to be noted, that the Montana bank merely gave Dunn a credit for \$750.00 and charged appellant with \$750.00, but it never paid any money to Dunn on account of such credit, and Dunn drew no checks against the same. The credit to Dunn and the corresponding debit to appellant upon the books of the Montana bank were merely provisional entries, and did not bind that bank to pay any checks against the fund before receiving notice from appellant that it had accepted the deposit made by appellee. As it did not receive that notice before its failure, it would have had the right at any time before such failure to cancel the credit to Dunn. The title to the fund did not pass to the Montana bank by virtue of these provisional entries made by itself upon its own books in advance of receiving from appellant any remittance of the fund, or any notice from appellant of its acceptance of the deposit, and in advance of any payments made to appellee or its superintendent on account of the fund. No such force or effect can be given to bookkeeping entries, which are regarded as being merely conditional, and which the bank is not precluded from canceling prior to the actual collection or receipt of the money indicated by them. (*Armstrong v. National Bank of Boyertown*, 90 Ky. 431; *Cutler v. American Exchange Nat. Bank*, *supra*; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880).

If appellant had remitted the money to the Montana bank instead of sending notice by mail of the deposit and credit, such remittance would not have reached the Montana bank until after its failure, and, in such case, it would not have gone into the general assets of the insolvent bank, but would have been held as a special fund subject to the right of appellee to reclaim it specif-

ically from the hands of the receiver. Appellee should not be placed in any worse position, because appellant retained the fund and paid its own debt with it and sent a letter of advice, than if appellant had forwarded the money and it had not reached its destination until after the failure of the Montana bank. Where a general deposit is made before formal insolvency, there can be no recovery in preference to other creditors, but where the deposit has been kept separate and not fully received before formal insolvency, the depositor may claim it; and money received upon collections subsequently to formal insolvency belongs to the owner of the paper, and can be recovered in full if it can be traced to the particular paper. (2 Morse on Banks and Banking,—3d ed.—secs. 589, 629, 631).

It is quite true, as announced in authorities referred to by counsel for appellant, that, where a customer makes a deposit in a bank, in the ordinary course of business, of a draft or check received and credited as money, and endorsed by the customer to the bank "for deposit" to be placed to his credit, the title to the draft or check vests in the bank, subject to the right on the part of the bank to charge it back to the depositor in case it is not paid on presentment. (2 Morse on Banks and Banking, sec. 574; *American Trust and Savings Bank v. Manufacturing Co.* 150 Ill. 336). But in such case there is an actual transfer of the title to the draft or check by endorsement upon the instrument itself. Here, however, there was nothing but a dispatch from appellee at Milwaukee to the bank in Montana, that a credit had been given to appellee's superintendent in the appellant bank at Chicago. This dispatch, and the credit given to appellee's superintendent by the Montana bank upon its books, could hardly operate as a transfer of the fund in appellant's hands in Chicago to the Montana bank in the same way as a check or draft, endorsed for deposit in a bank and credited to the depositor, becomes the property of the bank. There

is nothing to show, that appellant had any notice or information of appellee's dispatch to the Montana bank, or of the latter's credit to Dunn, or of the arrangement between appellee and the Montana bank for the making of such credit. By the terms of the credit the Montana bank in its individual capacity was not entitled to the fund, but it was only entitled to it as trustee for the use of Dunn; and what took place between appellee and the Montana bank could not change appellant's obligation to hold the fund for the account of the Montana bank to the use of Dunn into an obligation to hold it for the Montana bank without reference to Dunn's interest, in the absence of any notice, on the part of appellant, of such arrangement. Hence, appellant still holds the fund upon the same terms and conditions upon which it originally received it.

If the Montana bank was indebted to appellant, and appellant will lose its debt by the surrender of this fund, it cannot be said that appellee is in any way responsible for the loss. If appellant is obliged to refund the money, it is in no worse condition than if the deposit had never been made. It would certainly be most inequitable to permit appellee to lose the fund altogether through an application of it to the payment of appellant's debt. As the money belonged to appellee and was placed in appellant's hands to be held for the use of appellee, there can be no equity in using it to pay a debt to appellant from the Montana bank, growing out of prior transactions between the Montana bank and the appellant, with which appellee had no connection whatever.

The ordinary relation between banker and depositor is that of debtor and creditor, and has nothing of the nature of a trust in it. (*Bank of the Republic v. Millard*, 10 Wall. 152; 2 Morse on Banks and Banking,—3d ed.—sec. 289; *Brahm v. Adkins*, 77 Ill. 263). When appellee deposited the fund with appellant under the terms contained in the letter of July 21, 1893, appellant, by accepting the deposit,

became a debtor not to the Montana bank, but to the Montana bank for the use of appellee's superintendent. When the Montana bank gave appellee's superintendent credit for \$750.00, it was not debtor to such superintendent by virtue of any money actually deposited with it; it had received no money either from appellee or its superintendent; it had merely given a credit in the expectation that, at some time in the future, it would receive or draw for the fund in appellant's hands. If the Montana bank had actually paid out money to the amount of the credit to appellee or its superintendent upon checks drawn against such credit, then the claim of the Montana bank to the fund now in appellant's hands would rest upon a valid consideration, to-wit: the money previously advanced upon the checks so drawn; but, as no checks were ever drawn against the credit and no money was ever paid out on account thereof to appellee or its superintendent, the claim of the Montana bank or its receiver to the fund now in appellant's hands would have no valid consideration to rest upon. To sustain the claim of the Montana bank to this fund would be to give something for nothing; it would be to give that bank appellee's money in exchange for a mere book entry which appellee never made use of and never realized a dollar upon. A decision, which would lead to such a result, would be most inequitable, and is not demanded by the necessity of enforcing any inexorable rule of law.

It seems that, on September 11, 1893, Dunn filed a claim for moneys due him from the Montana bank, including the amount of the credit so given him, with the receiver of the bank, and that the claim has been allowed. It is insisted, that appellee has ratified the proving of this claim by Dunn, because it has neglected to repudiate Dunn's action. Nothing is shown to have been paid upon the claim, and it was filed and proved without the knowledge, consent or authority of appellee. Appellee's rights cannot be prejudiced in the manner claimed by the action

of Dunn. Nor will the rights of appellant be prejudiced thereby, in case judgment goes against it in favor of appellee for the amount of the fund now in its hands; because, on payment of the judgment, the allowance of the claim can be set aside, or appellant can be subrogated thereto to the amount of the judgment here.

We are not inclined to change the judgment of the Appellate Court so far as it fails to include interest upon the amount in controversy. Without passing upon the question whether interest should or should not have been allowed, we deem it sufficient to say, that, when the motion to enter judgment with interest, made some time after the judgment without interest had been entered, was denied by the Appellate Court, no exception was taken to its action in so denying the motion.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

SIMON SINSHEIMER

v.

THE WILLIAM SKINNER MANUFACTURING COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. **PARTIES**—*all partners liable for debt must be joined—plea of non-joinder.* All persons who were partners at the time a debt was contracted by a firm, must, in the absence of legal excuse, be joined in a suit for payment, and if not joined, those sued may take advantage of the non-joinder by plea in abatement.

2. **PLEADING**—*leave to amend is not, in itself, an amendment.* Though leave given to strike out the entire common counts may be regarded as tantamount to a dismissal thereof, yet mere leave to strike out certain allegations in a count and insert new ones does not, when unexecuted, amount to an amendment.

3. **SAME**—*when defense of non-joinder need not be raised by plea.* Where a declaration shows on its face that a party then living and not made defendant is jointly liable on the contract with the party sued, the defendant may take advantage of the non-joinder by demurrer, motion in arrest or by writ of error.

185	116
80a	222
185	116
181	630

165	116
95a	1350

165	116
e206	228

4. SAME—*presumption as to whether party mentioned in a pleading is living or dead.* When a pleading shows on its face that a person mentioned therein has been heard of within the seven years necessary to raise a presumption of death, a presumption that such person is living results.

Sinsheimer v. Skinner Manf. Co. 54 Ill. App. 151, reversed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

This was a suit in assumpsit, brought by the William Skinner Manufacturing Company against Simon Sinsheimer, to recover the amount of an indebtedness to the plaintiff for goods sold and delivered. The declaration, as originally filed, consisted of the common *indebitatus assumpsit* counts only, and to that declaration the defendant filed a plea of *non assumpsit*. Subsequently the plaintiff, by leave of the court, filed four additional counts, in which it averred, in substance, that the defendant and one Samuel Sinsheimer, co-partners doing business under the firm name of S. Sinsheimer, became and were indebted to the plaintiff in the sum of \$400 for goods, wares and merchandise by the plaintiff sold and delivered to the firm of S. Sinsheimer, and being so indebted to the plaintiff, the defendant, Simon Sinsheimer, in consideration thereof, undertook and faithfully promised the plaintiff well and truly to pay the plaintiff the sum above mentioned when afterwards requested so to do, and that, although often requested, he had neglected and refused to make such payment. To the additional counts the defendant filed a plea, verified by affidavit, denying that he had jointly undertaken or promised in manner and form as alleged in the additional counts, and also filed a plea of *non assumpsit*, verified by affidavit. Upon the issues thus formed a trial was had before the court and a jury, resulting in a verdict finding the issues for the plaintiff and assessing its damage at \$278.35.

The evidence on the part of the plaintiff tended to show a partnership between the defendant and Samuel Sinsheimer, under the firm name of S. Sinsheimer, and the sale and delivery by the plaintiff to the firm of the goods in question, at the request of the firm or of one of its members. The evidence on the part of the defendant, on the contrary, tended to show that while such partnership previously existed, it was terminated by the withdrawal therefrom of the defendant, and that notice of such withdrawal was given by the defendant to the plaintiff prior to the sale and delivery of the goods. The defendant's evidence also tended to prove, that after the dissolution of the firm by the withdrawal of the defendant the business was carried on by Samuel Sinsheimer, and that the goods in question were sold and delivered to him. The plaintiff, in rebuttal, gave evidence tending to show that prior to the accruing of the indebtedness sued for, the plaintiff and William Skinner & Sons (the firm of which the plaintiff corporation is the successor) had been doing business with the firm of S. Sinsheimer by way of selling the firm goods on credit, and that no notice whatever was received by the plaintiff of the dissolution of the defendant's firm, or of his withdrawal therefrom, prior to the sale of the goods in question.

While the motion for a new trial was pending, the plaintiff asked and obtained leave to amend its declaration, first, by striking out or dismissing the original common *indebitatus assumpsit* counts; and second, by striking out of each of the additional counts the allegation of a promise or undertaking by the defendant, and inserting in lieu thereof an allegation of a promise or undertaking by the firm of S. Sinsheimer. The leave thus given, so far as the additional counts are concerned, does not seem to have been acted upon, and the amendments proposed do not seem to have been in fact made. The defendant thereupon asked leave to file to the additional counts as proposed to be amended, a plea of *non assumpsit* and a plea

denying his partnership with Samuel Sinsheimer, both verified by affidavit, which was denied. The motion for a new trial was then overruled, and judgment was rendered in favor of the plaintiff in accordance with the verdict. That judgment has been affirmed by the Appellate Court, and this appeal is from the judgment of affirmance, that court having granted the necessary certificate of importance.

MOSES, PAM & KENNEDY, for plaintiff in error:

All actions at law to recover debts due from a partnership or firm must be brought against all the partners, by name, who are members of the firm at the time the indebtedness sued for was contracted, even including the bankrupt. *Page v. Brandt*, 18 Ill. 37; *Pettis v. Atkins*, 60 id. 455; *Dement v. Rokker*, 126 id. 191; *Edwards v. Dillon*, 147 id. 14; *Bristow v. James*, 7 Taunt. 257; *Byers v. Dobie*, 1 Hy. Bl. 236; *Ditchbaum v. Sproecklin*, 5 Esp. 31; *Doyle v. Dycus*, 3 B. & A. 611; *Rice v. Schute*, 5 Burr, 261; *Vernon v. Jeffreys*, 2 Strange, 1146; 1 Chitty's Pl. 4751.

Where a plea denying partnership or joint liability is not filed, the plaintiff is nevertheless bound to prove the case stated in the declaration; and if the plaintiff has stated a cause of action against two or more as partners, although the action is against one alone, the proof must establish a cause of action against all, the same as if all had been sued. *Cassady v. Trustees*, 105 Ill. 565; *Supreme Lodge v. Zuhlke*, 129 id. 303.

JAMES A. PETERSON, for defendant in error:

Actions against co-partners as defendants are joint and several. Hurd's Stat. 1893, sec. 3, chap. 76, p. 883; *Bank v. Ferry's Admrs.* 40 Ill. 255.

"In actions upon contracts, expressed or implied, against two or more defendants, as partners or joint obligors or payors, whether so alleged or not, proof of the joint liability or partnership of the defendants, or their

christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability or the execution of the instrument sued upon, verified by affidavit." Practice act, sec. 35.

"Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, or upon confession *nil dicit* or *non sum informatus*, or upon any writ of inquiry of damages, be reversed, impaired or in any way affected by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: * * * Fifth, for any mispleading, insufficient pleading, lack of color, miscontinuance, discontinuance or misjoining of the issue or want of a joinder of the issue." Hurd's Stat. 1893, p. 143.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

While obtaining leave to strike out the common counts may be regarded as tantamount to a dismissal of those counts, a mere permission by the court to amend the other counts by striking out certain allegations and by inserting others in their stead did not, of itself, amount to an amendment of such counts. (*Ogden v. Town of Lake View*, 121 Ill. 422; *Wisconsin Central Railroad Co. v. Wiczorek*, 151 id. 579.) The additional counts then not being in fact amended, there was no error in refusing to allow the defendant to file the pleas tendered while the motion for a new trial was pending. Issues had already been formed upon the declaration as it then stood, and the application to file further pleas was an appeal to the discretion of the court, and a refusal to allow them to be filed was not such abuse of discretion as can be assigned for error. Besides, the additional counts not having been in fact

amended, there was nothing in the record to which the pleas tendered could apply. The common counts being out of the record, the case must be decided solely in view of the issues formed on the additional counts.

The proposition most strenuously insisted upon is, that the judgment should be reversed on account of the non-joinder of Samuel Sinsheimer as a party defendant. The rule is a familiar one that in actions *ex contractu* all parties jointly liable should be joined as defendants. But if a party who should have been joined is omitted it is well settled that the other defendants can take advantage of the non-joinder only by plea in abatement. If, however, it expressly appears on the face of the declaration or some other pleading of the plaintiff that the party omitted *is still living*, as well as liable jointly with the other defendants on the contract, the other defendants may demur, or move in arrest of judgment, or sustain a writ of error. (*Hamilton v. Buxton*, 6 Ark. 24; *McGregor v. Balch*, 17 Vt. 562; *Cabell v. Vaughan*, 1 Wms. Saund. 261, note; Chitty's Pl. 53; Gould's Pl. 258; Andrews' Stephens' Pl. 48.) If there was a liability on the part of this defendant, then it also appears on the face of this declaration that Samuel Sinsheimer was jointly liable with him as a member of the firm which is alleged to have purchased the goods sold.

It is a rule of law, in general, that a person is presumed to be alive until he is proved to be dead, unless seven years have elapsed since he was heard of, in which case there is a presumption of death. When, from the declaration, it appears there can be no presumption of death the presumption of life results. In a note to Chitty (p. 47) it is stated: "In general a person is presumed to be living until it be proved that he is dead, unless seven years have elapsed since he was heard of. (2 East, 313; 6 East, 85; 1 Saund. 235a, n. 8.) But this seems an exception; *sed quere*. See 2 Taunt. 256, 2 Anstr. 448, 3 id. 811, from which it should seem that if it appears in a dec-

laration, or in a *scire facias* at the suit of the king on a bond, that there were other joint contractors, though it be not averred that they be living, the declaration and *scire facias* will be deemed insufficient."

Gould on Pleading (p. 260, sec. 115,) says: "But in an action on contract, if it appears from the face of the declaration, or of any other pleading on the part of the plaintiff, that a person not made defendant in the suit was a joint contractor with the defendant, and that such person is still living, (as he must be presumed to be unless the contrary is alleged,) the non-joinder of him is a good ground of demurrer or motion in arrest of judgment, and (if judgment be given for the plaintiff) may assign for error, for in this case the pleading of the plaintiff himself shows that he has no right to recover in the suit as it is brought, and as the mistake appears on the record by his own showing, there is no need of the defendant's pleading it." The same author, on page 256, in discussing the relation of the plaintiff to a declaration, again states: "If in an action of debt, covenant broken or assumpsit brought by A alone, it appears from his own pleading that the contract was made with himself and B jointly, and that B is still living, (as he is presumed to be unless the contrary appears in the declaration,) the defendant may demur without reciting the contract, or may, after verdict, move in arrest of judgment or reverse a judgment against him on a writ of error, for in this case, as it appears from the plaintiff's own showing that he alone has no right of action, the defendant is not under necessity of showing the mistake by pleading the fact which has occasioned it."

In *Cummings v. People, for use, etc.* 50 Ill. 132, it was said (p. 135): "It is admitted, if the defendants in error had not alleged in their declaration that the defendants therein, together with Argo, executed the bond, the defendants would have been required to plead his non-joinder in abatement. But the fact appears on the face

of the declaration. A plea, therefore, was not necessary to bring it before the court. Why inform the court by plea of a fact which the plaintiff himself places on the record? This defect in the declaration could have been reached by general demurrer or by motion in arrest of judgment, and can now be availed of on error. Plaintiffs, by their own showing, inform the court there is another joint obligor, who has not been joined in the action. It was patent of record, and no plea was necessary to bring the fact before the court."

It was not required of defendant to plead in abatement the non-joinder of his co-partner, as the fact appeared on the face of the declaration. All persons who are partners in a firm at the time when a contract is made must be joined in an action to enforce payment, unless there be a legal excuse for not joining them. (*Page v. Brant*, 18 Ill. 37; *Pettis v. Atkins*, 60 id. 454; *Dement v. Rokker*, 126 id. 174; *Edwards v. Dillon*, 147 id. 14.) The rule is, the plaintiff must join as parties defendant all who are jointly liable upon the contract, and if he does not he cannot recover against any. (*Page v. Brant*, *supra*.) The fact of non-joinder appearing on the face of the declaration, the defendant may avail himself of that fact, on error, to defeat a right of recovery.

It was error for the circuit court of Cook county to enter judgment against the defendant, and the Appellate Court erred in affirming that judgment. This view of the case renders it unnecessary to discuss the other questions raised.

The judgments of the circuit court of Cook county and of the Appellate Court for the First District are each reversed, and the cause is remanded.

Reversed and remanded.

JOHN W. WAUGHOP, Exr.

v.

NELSON S. BARTLETT *et al.**Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.*

1. EXECUTORS AND ADMINISTRATORS—*section 70 of the Administration act construed.* Section 70 of the Administration act, (Rev. Stat. 1874, p. 116,) providing that all demands not exhibited within two years after the granting of letters of administration shall be forever barred, etc., is merely a specific act to facilitate the administration of estates, and is not a general statute of limitations.

2. SAME—*claims not filed are not barred except as to participation in inventoried assets.* Failure to file a claim against the estate of a deceased person within two years after the granting of letters of administration does not bar the claim itself, but merely the right to claim a distributive share in the inventoried property.

3. SAME—*mortgagee relying solely on his security need not probate his claim.* A mortgagee relying entirely on his security need not, upon the death of the mortgagor, probate his claim against the estate, but may foreclose, upon default, against the property on which he has a lien.

4. SAME—*effect of inventorying mortgaged property as assets.* The fact that an executor inventories mortgaged lands as assets of the estate will not affect the mortgagee's right to foreclose without first probating his claim, as such executor can only inventory the title held by his decedent.

5. SAME—*to reach inventoried assets a mortgagee must probate claim.* A mortgagee desiring to have recourse on inventoried assets in the event of a deficiency after sale of the mortgaged property, must probate his claim.

6. SURETY—*when failure to probate a note will release surety.* Where the estate of a deceased person is sufficient to pay all claims, the failure by a holder of decedent's note to file the same as a claim against the estate will operate to release a surety thereon.

7. EVIDENCE—*burden of proof when payments on note are endorsed in payee's handwriting.* Where payments on a note, or for interest thereon, are all endorsed in the payee's handwriting when the maker was not present, it devolves upon the holder, relying on such payments to avoid the bar of the statute, to show they were made by the maker or some one in authority for him.

8. LIMITATIONS—*payment by personal representative revives cause of action.* Payment by a personal representative who has unquestioned authority on an indebtedness otherwise barred will bind

165	124
78a	197
165	124
82a	295

165	124
98a	27
198a	28
165	124
108a	391

those whom he represents, and take the indebtedness out of the bar of the Statute of Limitations.

9. *SAME*—*unauthorized payment by one joint maker will not stop the running of the statute against the other.* One joint maker of a note can not, by payment thereon or any other act, stop the running of the Statute of Limitations against another joint maker, except when duly authorized for that purpose.

10. *NOTICE*—*mortgagee after recording mortgage is not charged with notice of subsequently recorded instruments.* A mortgagee, having duly recorded his mortgage, will not be charged with constructive notice of the contents of instruments afterwards filed for record.

11. *MORTGAGES*—*foreclosed after death of trustee without appointment of another.* A power of sale given by a trust deed cannot be executed, after the death of the trustee named therein, without the appointment of a new trustee, but the deed may be foreclosed in chancery without such appointment.

Waughop v. Bartlett, 61 Ill. App. 252, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This is an appeal from the Appellate Court for the First District affirming a decree of the Superior Court of Cook county in a bill to foreclose a trust deed in the nature of a mortgage. The trust deed, with the note which accompanied it, was for the sum of \$6000, bearing date January 1, 1876, and was executed by Ellen Waughop, since deceased, and John W. Waughop, her husband, conveying certain real estate in the city of Chicago. The note, by its terms, was payable five years after date, with interest at eight per cent, and was signed by both the above named parties. The note bore a credit of \$1000, paid as of date May 17, 1880, on the principal, and the balance of \$5000 was on January 1, 1881, extended for one year, with a reduction of interest to seven per cent. Indorsements on the note show the interest paid to January 1, 1890. Ellen Waughop, the principal maker of this note, died in February, 1888, leaving a last will and testament, in and by which she named John W. Waughop, her

husband and appellant in this case, as her executor and trustee. He accepted the trust and duly qualified, and letters testamentary were issued to him March 15, 1888.

The note in question, secured by the deed of trust, was not probated against the estate of Ellen Waughop within two years after the granting of letters testamentary, nor at any time, but on April 9, 1894, a bill in chancery was filed in the Superior Court of Cook county to foreclose this trust deed. To this bill John W. Waughop, surviving husband of Ellen Waughop, together with all the heirs-at-law of Ellen Waughop, were made parties defendant. By the deed of trust before mentioned, one Robert C. Wright was named as trustee, and in the event of his death John A. Tyrrell was named as successor in trust, with like power to act. The bill sets forth that Wright died in December, 1879, and that the legal title then vested in Tyrrell, and that Tyrrell died on July 8, 1887. The bill also makes the widow and heirs of John A. Tyrrell, the successor in trust, parties defendant. The bill is otherwise in the ordinary form of a bill to foreclose a trust deed of this character, and prays execution against John W. Waughop for any balance that shall remain due to the orators of the principal and interest on said note if the sale under decree thereof shall fail to realize sufficient to pay the whole debt. John W. Waughop was, as before stated, made a party defendant, but not in his official capacity as executor of the last will and testament of Ellen Waughop, deceased.

A demurrer was filed to the bill by John W. Waughop upon the ground that he was not made a party defendant in his capacity as executor and trustee, and this being overruled, he filed an answer on the part of himself individually and also as executor of the last will and testament of Ellen Waughop, deceased, joining therein the heirs of Ellen Waughop, deceased. By this answer the defendants in substance set up as a bar to the prosecution of this suit the seventh clause of section 70 of chapter 3

of the Revised Statutes, relating to the administration of estates of deceased persons, and which provides: "All demands not exhibited within two years, as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate," etc. It is also urged in the answer of defendants to this suit, that the note is barred by sections 11 and 16 of chapter 83 of the Revised Statutes, which together constitute the ten years statute of limitations on evidence of this character. Various other matters in defense were set up in the answer, which will be considered in the opinion in this case. The foregoing were, however, the principal matters of defense relied upon by appellant.

The cause was referred to the master in chancery of the Superior Court of Cook county to take proof and report his conclusions of law and of fact. The master reported, finding that neither of the sections of the statute above quoted was a bar to the prosecution of this suit and that no defense existed, whereupon the court, upon a hearing, approved of the report of the master, and entered a decree of foreclosure and sale of the premises described in the trust deed. On appeal to the Appellate Court for the First District this decree was affirmed, from which decree of affirmance this appeal is prosecuted to this court.

JOHN W. WAUGHOP, *pro se*.

WILLIAM ODELL CLARK, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The facts in the case are fully set forth in the statement. The proposition most strongly urged by appellant is, that it is the duty of the holder of a note secured by a

mortgage or deed of trust, the maker of which has died, to present the debt for allowance in the probate court within two years after the issuing of letters testamentary or of administration, and that a failure so to do will, under the seventh clause of section 70 of chapter 8 of the Revised Statutes, operate as a bar except as to subsequently discovered assets not inventoried, and it is argued that the note being thus barred and being the debt itself, of which the mortgage is only an incident, no suit could be maintained to foreclose the mortgage or deed of trust given to secure the payment of the note.

The section of the statute relating to the presentation of claims against the estate of a deceased person is not a general statute of limitations taking away all remedy, both personal and against the property of a person deceased. It is a specific act, adopted for the particular purpose of facilitating the early settlement of estates. This court said in *Peacock v. Haven*, 22 Ill. 23: "As we understand that section, and as it has been construed by this court, and as its plain language seems to import, a claim is not barred if not presented within two years, but simply the right to claim a distributive share in or any participation out of the property actually inventoried." To hold that a claim is absolutely barred to the same effect as by a general limitation act would be to deprive a creditor of the unquestioned right, given him by the section of the statute itself, to recover a judgment after two years and satisfy his claim out of subsequently discovered assets not inventoried. This remedy has been frequently found by this court to exist in the many cases where the question has been before it. (*Snydacker v. Swan Land Co.* 154 Ill. 220; *Darling v. McDonald*, 101 id. 370; *Roberts v. Flatt*, 142 id. 485; *Russell v. Hubbard*, 59 id. 335.) As has been held in such cases, however, the judgment should be special, and not general. A failure, therefore, by appellees in the present case to file their claim against the estate of Ellen Waughop, deceased, within two years

from the issuing of letters testamentary, had the effect of barring the note as a claim against her estate,—that is, they could not participate or take any part in the distribution of the general assets of the estate if the note itself were the only evidence of the indebtedness. And the further effect of not so presenting this claim also would have been to discharge the appellant as a surety on the note, to the extent the note might have been collected from the estate of Ellen Waughop. Rev. Stat. chap. 132, sec. 3; *Huddleston v. Francis*, 124 Ill. 195; *Field v. Brokaw*, 148 id. 654.

It cannot, in the light of the foregoing authorities, therefore, be seriously urged that a failure to file a claim against the estate of a deceased person will operate as an absolute bar to the debt where not otherwise barred, but its only effect is to prevent any participation in the inventoried assets of the estate.

Appellant, however, insists that the particular property conveyed in the deed of trust was inventoried as part of the estate of Ellen Waughop, and no claim having been filed, appellees could not therefore have recourse to this property. This brings before us for consideration the proposition whether it is incumbent on the holder of a note secured by mortgage or deed of trust to probate his note when the maker is dead, and on a failure to so do, whether or not he can, after the expiration of two years, resort to the mortgaged premises to make his debt, such premises having been properly inventoried as assets.

The right of action of the mortgagee or legal holder of a note is independent of the remedy given him by filing his claim in the probate court, and a failure to so present his claim in the probate court within two years will not, of itself, bar a right of foreclosure of a note and mortgage not otherwise barred. Such a proceeding is not one against an estate nor is it one *in personam*. It is in the nature of a proceeding *in rem* to enforce certain security specially set apart for the indemnity of the holder of the

note. In *Karnes v. Harper*, 48 Ill. 527, it is said (p. 529): "In a proceeding to foreclose a mortgage in chancery the decree ascertains the sum due and orders the sale of the specific property for its satisfaction. It is in the nature of a decree *in rem*."

Where land is encumbered by mortgage or deed of trust the mortgagee is held in law to be the owner of the fee. (*Esker v. Heffernan*, 159 Ill. 38; *Taylor v. Adams*, 115 id. 570; *Finlon v. Clark*, 118 id. 32). The equity of redemption only is vested in the mortgagor or his assigns. Where mortgaged lands, therefore, descend to an executor or trustee he acquires no greater title than had his decedent, and that is a mere equity of redemption. All he can properly inventory is this right or interest in the land. All that appellant in this case inventoried was an equity of redemption, and when appellees seek to foreclose their trust deed and have a decree of sale they are not participating in inventoried assets, but are enforcing their claim against an estate before then conveyed to them, and an estate which the executor or administrator had no right to inventory. The equity of redemption was an interest, only, which, by operation of the terms of the instrument itself, had been forfeited to the greater estate.

Upon the execution and delivery of a note and mortgage specific property is thereby set aside and a lien created upon it for the payment of the debt. Upon the death of the maker, if the debt be not due no proceeding to foreclose could be maintained. If the holder of the note be then required to probate his claim, it would follow that instead of being permitted to resort to specific security he must stand on a par only with other creditors who had acquired no such lien. The effect of this would be to unjustly deprive him of such additional security. In the case of *Dodge v. Mack*, 22 Ill. 93, a judgment had been rendered and an execution issued and placed in the hands of the officer before the death of the judgment debtor, and the question presented was, whether the death of the de-

fendant in the execution would prevent a levy and sale under such execution. This court held in the negative, and in its opinion said (p. 96): "Yet that there are cases where the debt may be collected without filing the claim and sharing in the distribution of the assets is undoubtedly true, as where the creditor holds a mortgage on property of deceased, or where property has been pledged to secure the payment of the debt, or where there has been a recovery and an execution issued and levied in the lifetime of the deceased. In each of these cases the property thus bound may be sold, after the debtor's decease, in satisfaction of the debt. In each of these cases the creditor has acquired a lien, and the specific property has been appropriated, either by the debtor or by the law, for its satisfaction, and the death of the debtor can in nowise affect the rights of the creditor." When appellant, therefore, as executor, took this particular property he did so subject to all the liens existing and in the same situation it was held by his testatrix. Her death could not in any way affect the lien of appellees' mortgage, nor would the fact of their filing or neglecting to file a claim in the probate court in any manner affect it. The right to file and have allowed a claim of this character, under the statute relating to the administration of estates, is only an additional remedy afforded the holder of a note secured by a real estate mortgage, and where he may desire to secure judgment over for any deficiency which may result after the sale of the specific property in which he has a lien or where he may desire to hold liable a surety on the note. The mortgagee's right to a prompt foreclosure of his mortgage is not, however, to be in any manner impeded by compelling him to first resort to any personal remedy. (*Palmer v. Snell*, 111 Ill. 161.) If he desires any judgment for deficiency, or recourse to any security not specifically pledged, he must proceed within the two years, in conformity with the statute. *Roberts v. Flatt*, 142 Ill. 485.

The right of the mortgagee to foreclose his mortgage against the property of a deceased person two years after the issuing of letters, and where no claim had been probated, is recognized in the case of *Field v. Brokaw*, 148 Ill. 654, and also in *Jones on Mortgages*, (vol. 2, sec. 1214,) where it is said: "The rule applies to a particular statute limiting the time within which claims against the estate of a deceased person might be presented or sued. The debt is not paid or satisfied by failure to present or sue it within the time limited, and the remedy on the mortgage may still be pursued." We recognize the general rule that where the note is barred, the mortgage being but an incident to it, all right of action on the mortgage is also barred, but the note is not barred on account of the failure to probate it within the two years. The case of *Mulvey v. Johnson*, 90 Ill. 457, supports the foregoing reasoning. In that case a bill to foreclose a mortgage was filed against the administrator, widow and heirs more than two years after letters were issued. This court recognized the right to do this, but very properly reversed the decree of the circuit court for the reason that it provided that any deficiency should be paid by the administrator out of the assets of the estate and awarded execution therefor.

We are referred to authorities of the Texas and Florida courts which would seem to support appellant's contention, but we find, on investigation, that in those States the remedy is regulated by statutes which hold, in substance, that no creditor shall begin suit without first having presented his claim to the administrator. Such is not the law in this State, and the authorities are not applicable.

Another defense urged by appellant to the prosecution of this suit is, that the note is barred by the 11th section of chapter 83 of the Revised Statutes, which provides: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the

nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." In *Schifferstein v. Allison*, 123 Ill. 662, it is held that the above section must be construed with section 16 of the same act, which provides: "Action on bonds, promissory notes, * * * shall be commenced within ten years next after the cause of action accrued; but if any payment or new promise to pay shall have been made in writing * * * within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay."

The note in this case shows indorsements of interest thereon, at regular semi-annual periods, from its date up to January 1, 1890. These indorsements of interest were all made by the holder of the note or his representative in the State of Massachusetts. Of themselves they would not constitute a new promise. Where payments on a note, or interest thereon, are all indorsed in the handwriting of the payee of the note when the maker was not present, it will devolve on the holder of the note to show that such payments were in fact made by the payer or some one in authority for him. *Drury v. Henderson*, 36 Ill. App. 521; *Lowery v. Gear*, 32 Ill. 382; *Stearns v. Sweet*, 78 id. 446.

Appellant admits by his answer, and in addition to that the proof shows, that the payment of \$175 interest as of June 12, 1890, as well as previous payments, were made by him, but he asserts that such payments were made in his own name, on his individual responsibility, and as a surety on the note. At the time of the last payment, of date June 12, 1890, appellant was executor of the last will and testament of Ellen Waughop. One of the provisions of her will, the conditions of which appellant accepted in writing previous to qualifying as executor, is as follows, after the words of devise to her executor and the description of the mortgaged real estate with other property: "But all and singular the aforesaid lots and premises are granted, bequeathed and conveyed

to my said executor and trustee in trust, to and for the following uses and purposes, that is to say, with power to collect all rents thereof, and use the same to pay taxes and assessments that may be levied thereon; to make and pay for the necessary repairs to said premises, and to pay the interest on certain incumbrances on a part of said premises, * * * and whatever can be saved to pay off the incumbrances on a part of said premises." By this will, dated August 9, 1887, the testatrix clearly referred to this indebtedness as an incumbrance on the property, and made specific directions to her executor to pay interest. Appellant, after qualifying as executor and trustee, filed in the probate court of Cook county his inventory, in which he described this property as "encumbered for \$5000 to Samuel E. Sawyer, of Boston, with interest at seven per cent," etc., thus clearly recognizing the existence and validity of the debt. In June, 1890, a draft was drawn on him through a Chicago bank for \$175 interest due in January of that year, which draft being paid by him, the proceeds were credited on the note. He was at that time the sole personal representative of the principal mortgagor. The premises had been devised to him in trust, one of the purposes of which was to pay the interest. He was practically the only person with whom the holders of this incumbrance would expect to transact their dealings. By the devise in the will he was the legal owner of the equity of redemption in these premises for the purpose named.

The contention of appellant is, that he paid this interest on his own responsibility and from his own means, as a surety on this note, and that his act in this respect could not bind the estate or the heirs of his testatrix. Since the decision in the case *Kallenbach v. Dickinson*, 100 Ill. 427, the law has been recognized as being that one joint maker of a note could not, by payment thereon or any other act, stop the running of the Statute of Limitations against another joint maker unless it appeared that

the party making the payment was the agent for that purpose. In the case before us, however, appellant was the identical person whose duty it was, under the will from which he derived his authority, to make these payments of interest. He had sufficient authority to bind this estate, and the heirs thereof, by such payment. His defense that he made this payment as surety is not consistent with the facts. When this payment was made more than two years had elapsed from the granting of letters testamentary, and this estate having been solvent and the note not probated, appellant would, as surety, have been absolutely discharged and released from all personal liability under the section of the statute above referred to, and would have had a complete defense to any action that might have been brought against him. We take the same view of this phase of the case as was taken by the master in chancery, the circuit and Appellate Courts, that the payment of interest was not made by appellant as surety, but as the representative of his testatrix. We hold that where the joint maker of a note or the personal representative of a deceased person has unquestioned authority from his co-maker or decedent to make payment on an indebtedness, his acts therein will bind those whom he represents to the extent of creating a new promise and bringing an indebtedness otherwise barred from out the Statute of Limitations. The effect of the payment made by appellant in this case was to create a new promise to pay, and his assignment of error on this question was not well taken. The indebtedness was not barred by the ten years statute of limitations.

Appellant shows that in July, 1877, about a year after the execution and delivery of the deed of trust to Samuel E. Sawyer, there was filed for record a certain deed from the father of Ellen Waughop to her, conveying these premises to her during her natural life and at her death remainder in fee to her children, who are parties defendant to this suit. It is not clearly apparent from this

record just what title she had when the trust deed was executed. It is conceded, however, that at that time she had good right to convey, and the deed of trust contained covenants of warranty. It is urged that at her death, by virtue of this deed filed a year after the trust deed, the legal title vested in her children; that it was error for the trial court to hold that a contract for extension of the note could be made by appellant after her death, but that the holder of the note must probate his claim within two years. What has been heretofore said applies in a great measure to this objection. The record does not show that any actual or implied notice was ever received by the holder of this note of the existence of this deed. Where the holder of a mortgage has caused it to be duly filed for record, he will not be charged with constructive notice of other instruments afterwards filed for record. *Meacham v. Steele*, 93 Ill. 135; *Heaton v. Prather*, 84 id. 330.

The title set up by defendants in this deed is adverse to that claimed by the principal mortgagor. It is not the province of the court, in a proceeding of this character and under like pleadings, to attempt to settle adverse titles, as would be the effect of passing on this question. That is for a court of law. (*Gage v. Perry*, 93 Ill. 176; *Borzarth v. Landers*, 113 id. 181; 2 Jones on Mortgages, secs. 1482, 1483.) Moreover, from our views as heretofore expressed in this opinion, it was not necessary, under any circumstances, for the holder of the note to probate his claim secured by mortgage if he was relying entirely on the mortgage security.

It is further assigned as error, that, the original trustee named in the deed of trust having died and the successor in trust being also dead, this suit could not be maintained because no person has been appointed trustee in place of the successor in trust. There is no merit in the objection made. The heirs of John A. Tyrrell were made parties defendant to this bill. Whether or not they were improperly joined with appellant was a question

which could have been raised, not by appellant, but by the parties improperly joined. (*Peoria, Decatur and Evansville Railway Co. v. Pixley*, 15 Ill. App. 283.) Where the proceeding was, as in this case, by foreclosure in chancery, the appointment of a new trustee was entirely unnecessary. His services could have been utilized by neither the holder of the note nor owner of the equity of redemption. If the holder of the note had attempted to exercise the power of sale given in the trust deed the case would have been different, and in all probability no proceeding could have been taken thereunder without the appointment of a new trustee. But such was not the case. In the case of *Warnecke v. Lemba*, 71 Ill. 91, the court says (p. 95): "Here the trustee was dead. There was no grantee or assignee, hence no legal representative, in the sense we suppose that term must have been used in the deed. Therefore there was no one who could rightfully make the sale. A new trustee should have been appointed to execute the power, or the trust deed should have been foreclosed by bill in chancery as an ordinary mortgage." In *Lill v. Neafie*, 31 Ill. 101, where the trustee named in the deed of trust had left the State, and, being requested by letter to proceed to sell the property, had failed to give any attention to the matter and was found to be guilty of gross neglect of duty, the court says (p. 106): "But when, in addition to his absence from the State, he gives no attention to his duties as trustee, a court is fully warranted in removing him and appointing a suitable person to carry the trust into effect. The better practice, however, would be to file a bill for a foreclosure, and on a decree require the master or a special commissioner to make sale and execute the trust."

Several other assignments of errors were made by appellant on appeal from the circuit to the Appellate Court, all of which are assigned in this court. We have carefully examined the questions raised by appellant therein, including the question of allowance of attorneys' fees,

and without discussion of the matters raised in these assignments of error we find that there is nothing which should cause a reversal of the judgment of the Appellate Court affirming the decree of the Superior Court. Appellant admits that this debt of \$5000 has never been paid or satisfied, and we have found in the discussion of the errors raised that it is not barred by any statute of limitations. A further discussion of other questions raised by the assignments of error is unnecessary.

The judgment of the Appellate Court affirming the decree of the Superior Court of Cook county is affirmed.

Judgment affirmed.

WILLIAM J. JEFFERSON

v.

THE JAMESON & MORSE COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

1. MASTER AND SERVANT—*contractor in full control of repairs on building is not a servant of owner.* A contractor having entire control of a building on which he is making repairs, using his own means and methods for doing the work on a previously adopted plan, is not a servant of the owner of the building, and the owner is not liable to third persons for his negligence.

2. LANDLORD AND TENANT—*landlord not liable to tenant consenting to repairs, for contractor's negligence.* A tenant who has consented, for a consideration, to the making of repairs on the rented building by a contractor whom the landlord has placed in full control, occupies no better position than a stranger in case he is injured through the contractor's negligence.

Jefferson v. Jameson & Morse Co. 60 Ill. App. 587, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE F. BLANKE, Judge, presiding.

165	138
176	110
77a	49
165	138
178	567
165	138
90a	1832

M. J. DUNNE, for appellant:

An independent contractor, and not his employer, is liable for damages resulting to a third person by the negligent performance of the work of such contractor or his servants, where the work is not subject to the employer's direction or control. *Railroad Co. v. Shalley*, 33 Fla. 397.

The owner of a building in process of construction by an independent contractor is not liable for an injury resulting from the negligent construction of the building. *Mickey v. Reaper Co.* 77 Hun, 559.

MATTHEWS & HUGHES, for appellee:

Nobody can escape from the burden of an obligation imposed upon him by law, by engaging a contractor for its performance. *Shearman & Redfield on Negligence*, sec. 176; *Waller v. Lasher*, 37 Ill. App. 609.

Where, under an agreement between a landlord and tenant, the landlord is licensed to make improvements, a contract arises, by legal implication, that such work shall be done in a skillful and careful manner, so as to avoid damage to the tenant. *Waller v. Lasher*, 37 Ill. App. 615; *Robbins v. Chicago*, 4 Wall. 679.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of assumpsit, brought by appellant to recover rent for the second floor of the building 175 Monroe street, in Chicago, under two leases executed by the appellee. To the declaration defendant pleaded the general issue, and also interposed a special plea, in which it set up that during the tenancy, whilst appellant was putting two additional stories on his building and making other alterations, a drain-pipe was broken and the water flooded its premises and did damage to its property, and that it and appellant submitted the matter to arbitration, and that the arbitrators appraised the damage at \$591.30, which sum appellant agreed to pay. Defendant also pleaded a set-off.

On the trial the leases were read in evidence, the occupancy of the premises by appellee and the amount due for rent being proved by appellant. It was also proved that appellant and appellee entered into a written agreement by which appellee consented to the making of said improvements, and appellant agreed to pay \$15 for each day that appellee was interrupted in its business and \$50 for cleaning up thereafter, and a new lease was to be given, and that after the work was done it was agreed that appellant was to allow appellee \$200 as such compensation. It was proved by appellant that he contracted with a competent and experienced builder to do the work of putting on the additional stories and making the other alterations, and that appellant took or had no control, supervision or direction over the work or the contractor or his workmen, and, save as owner engaging such contractor, had nothing to do with the breaking of the drain-pipe which caused the flooding of the premises of appellee.

The cause was submitted to the court without a jury, and upon the evidence the court gave judgment for appellee for costs, holding that the sum appraised as the amount of damages, \$591.30, and the sum agreed by the parties under the written agreement, \$200, could be deducted from the rent due but no set-off could be allowed. Plaintiff appealed to the Appellate Court, where the judgment was affirmed.

In the propositions of law submitted to the court by appellant it was claimed that where the owner of a building contracts with a competent and experienced mechanic to build additional stories to his building, and turns over the entire work to him, and that by reason of the negligence of the contractor or his workmen, or from any other cause without any fault of the owner, the premises of a tenant in such building are injured and his goods damaged, the owner is not liable to the tenant for such damage, and that the tenant's remedy, if he has any, is against

the person causing the damage. The court, however, refused to hold as law the propositions of appellant bearing on the question, but held that under the evidence introduced appellant was liable to appellee for all damages sustained.

In *Scammon v. City of Chicago*, 25 Ill. 424, it was held that where an owner of land contracts with a skillful mechanic to erect on the land a building and surrenders the premises to the contractor, the owner is not answerable in damages for an accident which occurs to a stranger passing by, and that if the injured party has any recourse it is against the contractor. In *Pfau v. Williamson*, 63 Ill. 16, it was again held that where the owner of a lot contracts with a skillful and competent builder for the erection of a house and surrenders to him possession of the property, and the work is not done under the direction of the owner, and injury results to a third person from the negligence of the contractor, the latter is not the servant of the owner, and the contractor alone is liable for the injury. In *Hale v. Johnson*, 80 Ill. 185, it was held that one who contracts to do a certain piece of work, furnishing his own assistants and executing the work in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the owner in respect to the details of the work, is a contractor and not a servant, and a person injured through the negligence of the contractor could not recover against the owner. The same rule has been adopted in other States. *Morton v. Thurber*, 85 N. Y. 550; *Hilliard v. Richardson*, 3 Gray, 349; *Forsythe v. Hooper*, 11 Allen, 419; *Lawrence v. Sherman*, 39 Conn. 586.

Where the owner employs a mechanic and sets him to work in repairing a building or in the construction of a new building, and furnishes the material to be used and retains direction of and control over the details of the work and the men employed, in such case the mechanic would be the mere servant of the owner, and the owner

would be liable for the negligence of the servant. But where the contractor is given the entire possession of the building where the work is being done, and uses his own means and methods for accomplishing the work, and is not under the immediate control of the employer but works under a plan adopted before he contracted to perform the work, he occupies the position of a contractor, and the employer will not be responsible for damages resulting from his negligence. (*Morgan v. Smith*, 159 Mass. 570.) Here, as appears from the evidence, appellant let the work of repairing the building to a competent and experienced mechanic, gave him entire control over the building, and surrendered to him all supervision and direction over the manner of doing the work. Indeed, after the contract for the repairs was made appellant had nothing whatever to do with the building or the work, but the entire management and control were in the hands of the contractor. Under such circumstances appellant was not liable, and the court erred in refusing the propositions of law submitted by him on this branch of the case.

The fact that appellee was a tenant of appellant, occupying the building where the repairs were made, does not, in our opinion, make this case an exception to the general rule heretofore announced. Appellee contracted in writing with appellant, for a certain consideration therein expressed, that the improvement or repairs might be made. Having agreed that the repairs might be made it occupies no better position, so far as its right to recover damages is concerned, than a stranger. In other words, after appellee contracted that the work might be done, it and appellant, so far as the work was concerned, occupied the position of strangers to each other. If appellant had gone on and employed mechanics and done the work himself, and damages had resulted through the negligence of his servants, he would be liable. But, on the other hand, if he saw proper to let the contract to a contractor and surrender the possession of the property

to him and give him the entire supervision and control of the work in all its details, and damages resulted through the negligence of the contractor, the latter alone would be liable for such damages.

The judgments of the Superior and Appellate Courts will be reversed and the cause remanded.

Reversed and remanded.

MICHAEL W. RYAN

v.

THE PEOPLE, for use, etc.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. EVIDENCE—*order of probate court on guardian's final report is admissible in action on his bond.* An order of the probate court finding the amount due from a guardian to his ward on his final account is admissible in a suit against the sureties on his bond.

2. SAME—*copy of bond admitted in evidence proves recitals contained in it.* Where, in an action on a guardian's bond, a copy of the bond is admitted in evidence which recites the guardianship and the names of the sureties, such recitals are sufficient evidence of the appointment of the guardian.

3. RES JUDICATA—*final order of probate court binds sureties of guardian as to amount due.* An order of the probate court finding the amount due from a guardian to his ward is conclusive upon the guardian and the sureties on his bond in an action of debt on the bond, and can only be impeached for fraud or mistake.

4. PLEADING—*when cause is at issue.* Where issue has been taken on pleas of *nil debet* and *non est factum*, filed to a declaration in debt on a guardian's bond, and no other form of pleading will entitle the plaintiff to recover without proving the affirmative on these issues, the cause is at issue, and all other pleas are superfluous.

5. CONTINUANCE—*party unprepared to proceed by reason of amendment of pleadings must file affidavit.* The overruling of a motion for continuance on the ground of amendment of pleadings presents no question for a court of review, where the moving party merely offers to file the statutory affidavit that he was unprepared, etc., but does not do so.

Ryan v. People, 62 Ill. App. 355, affirmed.

165 143
171 246;

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

The opinion of the Appellate Court by Presiding Justice GARY (62 Ill. App. 355) is as follows:

"It appears that this case was on a short cause calendar of the circuit court, and a trial attempted June 17, 1895, but the trial went off under an order setting it for trial on the short cause calendar for June 24, 1895. Then, on July 9, 1895, which was not one of the days set apart for the hearing of cases upon the short cause calendar, the cause was called for trial and the appellant moved to strike said cause from the trial call for that day, assigning among other reasons which relate only to the cause being called upon a short cause calendar, of which there is no evidence in the record: 'Third, that said cause having lost its place upon the short cause calendar, and never having been replaced upon the regular trial calendar, it could not properly be called for trial, no cause having been shown for the trial of said case out of its proper order; fourth, that the said cause having been called for trial at the June term, 1895, of said court, and then continued, it could not properly again be called for trial at the same term of court; fifth, that said cause was not at issue, no replication to the third plea of said defendant, Ryan, to the amended declaration herein having been filed.'

"*First*—Whether the cause had been replaced upon the calendar or not does not appear, and reciting in the motion that it had not been is no evidence.

"*Second*—The cause had not been continued over the term, which runs from the third Monday of one month to the Saturday next before the third Monday of the succeeding month.

"*Third*—The last reason is no reason. Issue had been accepted by the appellee upon *non est factum* and *nil debet* by the appellant, and no form of other pleading would entitle the appellee to recover without proving the affirmative on these issues. All other pleas and replications were useless verbiage.

"To the special plea of performance before filed, the court permitted the appellee then to file a replication, whereupon the appellant moved for a continuance, and offered to make and file an affidavit that by reason of filing such replication he was unprepared, etc., but did not do so. No question arises on such an offer. The act—not an offer—is what is required by the statute. (Sec. 26, Practice.) Neither the proof required of the appellee nor the evidence admissible for the appellant was affected by that useless plea and what followed it. We treat it as surplusage.

"The action was debt upon a guardian's bond. After a great deal of skirmishing as to the absence of the original bond, a copy was read without any objection shown on the abstract. Whether secondary evidence of the bond was admissible is not now a question before us. The recital in the bond made other proof of the appointment of a guardian unnecessary. *Blackburn v. Bell*, 91 Ill. 434.

"The only question which apparently touches the merits of the case is whether proof was made of the cause of action alleged. The breach of the bond assigned was, 'that divers moneys and profits from the personal estate of Frank J. Degan, amounting to \$5000, came to the hands of said Joseph Goergen, as such guardian, and that he converted and disposed of same to his own use.' (Quoted from abstract.) The only proof of that breach was an entry on the record of the probate court, as follows: 'In the matter of the guardianship of Frank J. Degan, minor.—It appearing to the court that upon presentation of a final account of the guardian in the above entitled

matter, that there is due said ward the sum of \$1071.51, together with the sum of \$120 accrued interest, and it further appearing that said Joseph Goergen, the guardian of said ward, is insolvent, it is therefore ordered and decreed that the said ward, Frank J. Degan, being now of lawful age, be authorized to commence legal proceedings against the said guardian and his sureties on his bond as guardian, to collect said money which may be due him from his said guardian and his sureties on account of the failure of said guardian to account for the money due his ward, it further appearing to the court that the guardian has failed to pay his ward the sum of money above mentioned within one day, in accordance with an order of the court heretofore entered in this cause.' To the introduction of that entry the appellants did not except, only saying: 'We object to that for the reason stated,—that the account and report are not put in to substantiate the adjudication.' After the evidence was all in the appellant moved the court to exclude the evidence and also to instruct the jury to find for the appellant, both motions for the reason that the evidence was variant from and did not support the declaration, and also, in a motion for a new trial, assigned as a ground that the verdict was not supported by the law or the evidence.

"The order, before copied, of the probate court is conclusive upon the appellant, surety on the guardian's bond, except for fraud or mistake. (*Gillett v. Wiley*, 126 Ill. 310.) The amount of the liability was thereby fixed, and it could have arisen only from moneys and profits from personal estate, so that, in legal effect, there was no variance. The hiatus in the order as to whom the money was due from is filled by the context.

"On the whole case, justice seems to have been done, and without error as to the appellant. As to his co-defendants, they are not here to complain, and he can not assign errors for them. *Richards v. Greene*, 78 Ill. 525.

"The judgment is affirmed."

CHYTRAUS & DENEEN, and WILLIAM S. YOUNG, for appellant.

CASE & HOGAN, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On examination of this record we are impressed with the fact that absolute justice has been done in the judgment of the Appellate Court, and concur with that court in its discussion of the questions of law presented.

In the additional brief and argument filed in this court it is urged the Appellate Court avoided considering whether there was error in the circuit court in the admission in evidence of the order of the probate court. The action being upon a guardian's bond, and a copy having been admitted in evidence, the order of the probate court, on its face, shows a presentation of the final account of the guardian and the amount due, with accrued interest. The bond itself recited the guardianship, the names of the sureties, the order of the probate court reciting the presentation of the final account of the guardian, and the amount due. Such order, in connection with the bond, furnishes the evidence of the appointment of a guardian, the names of the sureties, the presentation of the final account and the amount found due thereon. Such order is conclusive upon the guardian and sureties upon his bond as to the amount actually in the hands of the guardian, and is impeachable only for fraud or mistake. It was not error to admit the order of the probate court in evidence.

Concurring, as we do, with the Appellate Court we decline to further discuss the question, and the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY

v.

THE VILLAGE OF ELMHURST.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

1. **SPECIAL TAXATION**—*determination of city council is final on question of benefits under act of 1872.* Under article 9, section 17, of the City and Village act, (Rev. Stat. 1874, p. 209,) as it existed prior to its amendment in 1895, (Laws of 1895, p. 100,) the determination of the city council in levying a special tax upon contiguous property was final upon the question of benefits.

2. **SAME**—*evidence of unreasonableness of special taxation ordinance, under act of 1872, addressed to court.* Evidence that a special taxation ordinance is unreasonable as to benefits is addressed to the court; but to justify an interference with the determination of the city council in fixing such benefits it must clearly appear, and ordinarily upon the face of the ordinance itself, that the council abused its discretion.

3. **SAME**—*portions of railroad company's right of way may be sold for special taxes.* By virtue of sections 42 and 178 of the Revenue act, (Rev. Stat. 1874, p. 854,) sections 1 and 2 of an act concerning collection of special taxes, (Rev. Stat. 1874, p. 908,) and sections 17 and 44 of the City and Village act, (Rev. Stat. 1874, p. 209,) construed together, the collection of special taxes levied upon a railroad company's right of way may be enforced by the sale of that portion specially taxed.

4. **SAME**—*special taxation not the exercise of eminent domain.* An objection that a special taxation ordinance deprives the party taxed of his property without compensation, in violation of the constitution, cannot be sustained, as the power to specially tax contiguous property is a branch of the taxing power, and is not an exercise of eminent domain.

5. **SAME**—*taxation in proportion to frontage is constitutional.* An ordinance requiring the cost of locally improving a street to be paid by special taxation of contiguous property in proportion to frontage does not violate the present constitution.

6. **RAILROADS**—*right of way may be specially taxed for local improvement.* A railroad company's right of way contiguous to a street is subject to special taxation for the paving of such street when specially benefited by the improvement.

APPEAL from the County Court of DuPage county; the Hon. C. A. BISHOP, Judge, presiding.

A. W. PULVER, (LLOYD W. BOWERS, of counsel,) for appellant:

Ordinances unreasonable and oppressive in their operation are void. *Dillon on Mun. Corp.* 319-321; *Railway Co. v. Jacksonville*, 67 Ill. 37; *Tugman v. Chicago*, 78 id. 405; *Lake View v. Tate*, 130 id. 247.

Whether a particular ordinance is unreasonable, and therefore void, is a question for the court and not for the jury, and evidence bearing upon the question is properly addressed to the court. *Lake View v. Tate*, 130 Ill. 247.

The power of a city council to declare what shall be a local improvement is an implied power. An ordinance exercising that power, though regularly passed, must be reasonable, otherwise it is void. 1 *Dillon on Mun. Corp.* sec. 319; *Wiggins v. Chicago*, 68 Ill. 372; *Tugman v. Chicago*, 78 id. 405; *Bloomington v. Railroad Co.* 134 id. 451.

The discretion of the municipal body ordering the improvement can be interfered with when there is a clear abuse of such power and discretion. *Lightner v. Peoria*, 150 Ill. 86.

Property such as railroad tracks and necessary right of way cannot be said to be benefited by the improvement in question. *Railroad Co. v. Milwaukee*, 89 Wis. 516; *Railroad Co. v. Philadelphia*, 88 Pa. St. 424; *Allegheny City v. Railroad Co.* 138 id. 375; *Bridgeport v. Railroad Co.* 36 Conn. 255; *Railroad Co. v. New Haven*, 42 id. 279.

A railroad franchise extends to the entire corporate property, and it is not possible that it can be divided. It must, if assessed at all, be assessed as an entirety. *Porter v. Railroad Co.* 76 Ill. 584.

Under the generally adopted method of taxing railroads, each, from one end to the other, is an entirety, and only as a whole may be subject to taxation or coercive sale. 25 *Am. & Eng. Ency. of Law*, 656; *Graham v. Coal Road Co.* 14 Bush, 426; *Franklin Co. v. Railroad Co.* 12 Lea, 521; *In re Railroad School Tax*, 78 Mo. 596.

F. J. GRIFFIN, (N. G. MOORE, of counsel,) for appellee:

Unless there is an abuse of its power by the city council, courts will not interfere. *Lightner v. Peoria*, 150 Ill. 87.

Where a railway is contiguous to a proposed street improvement it may be specially taxed for the making of such local improvement. *Railroad Co. v. Joliet*, 153 Ill. 649.

The lot owner cannot inquire what benefit, if any, other property owners receive on account of the improvement. *Davis v. Litchfield*, 155 Ill. 384.

There is no constitutional or statutory exemption against assessing railroad property, if specially benefited. *Railway Co. v. People*, 120 Ill. 104.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from an order of the county court of DuPage county, confirming a special tax levied against certain right of way of the appellant under an ordinance of the village of Elmhurst for the paving of First street, which runs parallel with and alongside of said right of way in said village. The ordinance provides for the paving of First street from the west line of Addison street, which is east of appellant's depot, to the west boundary line of the village, and the original assessment roll described a strip of land belonging to appellant running west from the west line of Addison street to the village limits. The special tax was levied upon the abutting property in proportion to frontage. Appellant's property, originally taxed in one parcel, abuts on the south side of the improvement. Upon motion of appellant and against the objection and exception of appellee, the county court ordered the assessment roll to be re-cast by dividing said strip of land into two parts and levying the special tax separately on each part, the first part embracing the depot grounds, running from the west line of Addison street to the east line of Maple street, and the second part running from the east line of Maple street

to the limits. After the assessment roll was re-cast, and the tax was divided and a separate amount assessed upon each of the two parts, the roll was confirmed. The appellant made no objection to the assessment against the portion of the strip between Addison street and Maple avenue which included the depot grounds, but filed objections to the tax as levied against the balance of the strip.

The objections made by appellant may be ranged under three heads: first, that the ordinance is unreasonable and void; second, that the special tax cannot be enforced by a sale of the property taxed; and, third, that this special tax deprives appellant of its property without compensation.

In support of the first objection it is said, that the property taxed is railroad right of way, and that, as such, it is not subject to special taxation for this local improvement, because it is not benefited thereby. We have held over and over again, that, under the statute in pursuance of which the present tax was levied, the determination of the common council is final upon the question of benefits, and that the land owner "cannot go behind the action of the city council imposing the tax and inquire what benefit, if any, the property owners receive on account of the improvement." (*Davis v. City of Litchfield*, 155 Ill. 384; *Chicago and Alton Railroad Co. v. City of Joliet*, 153 id. 649).

The county court, in the present case, did, however, permit evidence to be introduced upon the question, whether the strip of land belonging to appellant would be benefited or not by the paving of the street alongside of it. If it were proper to consider this evidence, it may be said of it that it tends to show, that the land in question would be benefited by the improvement by reason of its nearness to the depot, and the crowded condition of the tracks running to the depot where cars are loaded and unloaded, necessitating to some extent the unloading of freight from cars upon the right of way in question. It has been held, that evidence bearing upon the ques-

tion, whether or not an ordinance is unreasonable, is addressed to the court. (*City of Lake View v. Tate*, 130 Ill. 247). But in order to justify a court in interfering with the determination of the city council as to benefits, it must appear that the council has clearly abused the power and discretion conferred upon it. (*Lightner v. City of Peoria*, 150 Ill. 80; *Chicago and Northwestern Railway Co. v. Town of Cicero*, 154 id. 656; *City of Springfield v. Green*, 120 id. 269). Ordinarily, such abuse of power and discretion must appear upon the face of the ordinance itself. (*Payne v. South Springfield*, 161 Ill. 285). If, however, it is allowable under any circumstances to look outside of the ordinance, we find nothing in the facts disclosed by the present record to show, that there has been any such abuse as makes the present ordinance unreasonable.

The right of way of a railroad company is subject to special taxation for a local improvement. (*Chicago and Alton Railroad Co. v. City of Joliet*, 153 Ill. 649, and cases there cited; *Chicago and Northwestern Railway Co. v. People*, 120 id. 104; *Payne v. South Springfield*, *supra*; *Illinois Central Railroad Co. v. City of Mattoon*, 141 id. 32; *Illinois Central Railroad Co. v. City of Chicago*, id. 509; *Kuehner v. City of Freeport*, 143 id. 92; *Rich v. City of Chicago*, 152 id. 18; *Illinois Central Railroad Co. v. Comrs. of Drainage District*, 129 id. 417; *Drainage Comrs. v. Illinois Central Railroad Co.* 158 id. 353; *Illinois Central Railroad Co. v. City of Decatur*, 126 id. 92; *Same v. Same*, 147 U. S. 191; *Same v. Same*, 154 Ill. 173; *Chicago, Burlington and Quincy Railroad Co. v. City of Quincy*, 136 id. 563; 25 Am. & Eng. Ency. of Law, p. 529, and cases referred to in note 1).

The second objection made by appellant is, that the special tax levied upon the portion of the right of way abutting upon the improvement can only be collected by the sale of such portion; and that a sale of a portion of the right of way cannot be made without breaking the continuity of the road and destroying its entirety for the purposes of transportation. This is an argument against

the validity of the special tax drawn from the supposed impracticability of the method necessary to be adopted for its collection. It would apply as well to the special tax if the improvement benefits the property to the full amount levied upon it, as to the special tax where the improvement is of no benefit whatever. Some of the courts, in the reasoning which they adopt to sustain the view that railroad right of way should not be subjected to special taxation or special assessment for local improvements, refer to the risk of severing the road if such taxation or assessment is enforced against it.

While it is held in this State that the railroad track must be regarded as an entirety for the purposes of assessment by the State Board of Equalization, yet after the board has equalized the valuation and distributed it among the counties, cities, towns and villages, it has never been held, that taxation cannot be enforced against railroad property the same as against any other kind of property. It is conceded by counsel for appellant, that a portion of a railroad right of way may be subjected to the payment of a special tax assessed against it, if there is legislative authority for such enforcement. The Revenue act of this State declares, that railroad right of way shall be held to be real estate for the purposes of taxation; and, by the use of the words, "when advertised and sold," in section 42 of that act, (2 Starr & Cur. 2042, 2043), contemplates the sale of portions of "railroad track" running through counties, cities, towns or villages. The statute thus expressly recognizes the right to enforce the collection of general taxes against portions of a railroad track or railroad right of way. The same act provides, (secs. 178, 304, 305), that special assessments which are unpaid shall be returned to the county collectors for collection in the same manner in which they are required to collect taxes, and that lands delinquent for such assessments shall be advertised and sold in the same manner as is required in regard to lands delinquent for State and

county taxes. (2 Starr & Cur. Stat. pp. 2080, 2125). Section 44 of article 9 of the City and Village act provides, that the general revenue laws of this State in reference to the recovery of judgments for delinquent taxes and the sale of property thereon shall be applicable to proceedings to collect special assessments, with certain exceptions which have no bearing here. (1 Starr & Cur. Stat. p. 503).

As, under the statutes of this State, State and county taxes can be enforced against portions of railroad right of way, and as special assessments can be enforced in the same manner as State and county taxes, and as special taxation of contiguous property is required to be levied, assessed and collected in the same manner as special assessments, (1 Starr & Cur. Stat. p. 491), we do not regard the second objection of appellant as well taken. Decisions in other States to the contrary of this view are based upon statutory provisions or other considerations which have no application here.

The third objection is, that this special tax deprives appellant of its property without compensation. The present is not a condemnation proceeding, nor is it a case where a special tax to pay for land taken for opening a street is levied upon other land than that so taken. Under the present constitution of this State special taxation of contiguous property is regarded as a branch of the taxing power, and the power to levy and collect such special taxes does not have its source in the constitutional provisions in regard to the right of eminent domain. (*Chicago and Alton Railroad Co. v. City of Joliet, supra*). The objection, that appellant receives no compensation, proceeds upon the assumption that its property is not benefited at all by the improvement, but, as has already been said, the common council have determined that it has been benefited, and where such benefit is equivalent to the amount of the tax, there is compensation.

We have held, that an ordinance, requiring the cost of improving a street to be levied by special taxation upon real estate abutting thereon in proportion to the frontage of the several lots, is not in violation of the present constitution of the State. (*City of Springfield v. Green*, 120 Ill. 269; *Wilbur v. City of Springfield*, 123 id. 395; *County of Adams v. City of Quincy*, 130 id. 566; *Davis v. City of Litchfield*, 145 id. 313). Counsel contends that, if the ordinance itself is an absolute determination of benefits, and if evidence is not admissible to show the entire absence of benefit, then there is here a taking of its property without due process of law. We do not deem it necessary to discuss this contention, because, as matter of fact, the court below permitted appellant to introduce proof to show that the land would not be benefited, and also permitted appellee to introduce proof to show that the land would be benefited, and decided from such proof that the land was benefited. We see no reason for disturbing this decision. The appellant, having had a hearing upon the question whether its property has been benefited or not, has not been deprived thereof without due process of law by reason of the imposition of the special tax here objected to.

The present proceeding is under section 17 of article 9 of the City and Village act, and what is here said applies only to that section, and its construction by this court, as the section was before the passage of the act of June 21, 1895, amendatory thereof. The latter act provides expressly, that an ordinance directing the making of a local improvement by special taxation shall not be deemed conclusive of the benefit to the property, but that the question of benefit and of the amount of the tax shall be subject to the review and determination of the county court and shall be tried in the same manner as in proceedings by special assessment. (Laws of 1895, p. 100).

The judgment of the county court is affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Bollweg

v.

DRAINAGE COMMISSIONERS UNION DISTRICT NO. 1, etc.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. DRAINAGE—commissioners cannot change district boundaries except by dissolution. Farm drainage commissioners have no power, after organization, to change the boundaries of a district except as provided in section 47½ of the Farm Drainage act, (Laws of 1889, p. 119,) which authorizes a dissolution, nor can a district be dissolved otherwise than as there provided.

2. SAME—a resolution of commissioners attempting to change district boundaries is invalid. A resolution adopted by farm drainage commissioners, after organizing a district, which attempts to change its boundaries, is invalid and does not affect the validity of the district organization.

3. SAME—an order of commissioners annulling former void resolution should stand of record. An order of farm drainage commissioners annulling a void resolution of former commissioners which attempted to change the district's boundaries has the effect of undoing the void act, and should be allowed to stand of record as removing a cloud on the district organization.

People ex rel. v. Drainage Comrs. 61 Ill. App. 416, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DuPage county; the Hon. C. W. UPTON, Judge, presiding.

The statement of this case and opinion of the Appellate Court for the Second District, by LACEY, J., (61 Ill. App. 416,) are as follows:

"This proceeding is instituted by a common law writ of *certiorari*, sued out of the circuit court of DuPage county by John Bollweg, as relator, for the purpose of having annulled and set aside certain proceedings of the drainage commissioners of Union District No. 1 of the towns of Milton and Winfield, in DuPage county, Illinois, which are claimed by him to be illegal and void.

"On November 8, 1886, a petition for the organization of Union District No. 1 of the towns of Milton and Winfield, in the county of DuPage and State of Illinois, setting forth the boundaries thereof, was filed in the office of the town clerk of the town of Milton. After the filing of the petition the town clerk, in compliance with the statute, gave notice to each of the commissioners, and they met November 10, 1886, and adjourned to November 19, 1886, at nine A. M., for the further completion of said union district. The clerk then posted notices, as required by law, that a meeting of the drainage commissioners would be held at the town clerk's office of the town of Milton at the hour of nine o'clock on the 19th day of November, 1886, (which was not less than eight nor more than fifteen days from the date of said notice,) for the purpose of organizing said drainage district. He also filed a copy of this notice in his office. Pursuant to this notice the commissioners met November 18, 1886, at nine o'clock A. M., for the further completion of the said union district, and thereupon proceeded to ascertain whether the petition contained the signatures of the requisite number of land owners. The necessary affidavit, to be signed by two credible signers of the petition, was duly signed and sworn to by Jesse C. Wheaton, Sr., and H. H. Hadley, and filed with the commissioners. At this meeting the record shows that the commissioners, after reciting the beginning and terminus of said drain, viz., the beginning to be 'at or near the Wheaton road' and the terminus 'to empty into the DuPage river,' after reciting the land over which it should pass, and after a full hearing upon the petition, found in favor of the said petition, and thereupon made a written statement of their finding, which was entered of record. The finding of the commissioners is in accordance with the statute. After the finding of the commissioners in favor of the petitioners the commissioners adjourned to November 27, 1886, (which was not less than eight nor more than fifteen days,) to

meet on the ground of the proposed ditch. On November 27, 1886, the commissioners went upon the lands of the proposed district and examined the same, and then and there duly adjourned to meet at the town clerk's office on December 10, 1886.

"On December 10, 1886, the map showing the district was approved, and the district was duly organized and work was commenced. A portion of the right of way was obtained, John Bollweg, the petitioner in this suit, having signed a release on December 15, 1886, and another release on November 9, 1893. A special assessment was made and collected, and everything ran along smoothly until March 25, 1887, when the drainage commissioners considered the question of changing the boundaries of said ditch, and commissioner Stacey offered a resolution to that effect, that the lower end or terminus shall be on the west line of the land of John Weisbrook, * * * which resolution was adopted. At a subsequent meeting, held April 2, 1887, the proposition of each party entering into an agreement to build his own ditch was discussed, and leave was given the land owners to petition the commissioners to abandon the ditch. A committee was appointed to carry out this proposition, and, awaiting the action of this committee, the commissioners adjourned to meet at the call of the chairman.

"As the record shows, this was all the action ever taken in reference to changing the boundaries or terminus of said ditch. It does not appear by the record that this committee ever reported nor that any further action in reference to this proposition was ever taken. The commissioners continued their control over said drainage district, making orders as late as August 20, 1890. In October, 1893, the old commissioners having gone out of office and new commissioners having been elected, it was decided by them to complete the ditch of this drainage district in accordance with the prayer of the original petition, and the order of December 10, 1886, organizing

the drainage district, a part of the work having already been done. The attempted action of the old commissioners in reference to changing the boundaries of said ditch was rescinded October 28, 1893, and an engineer was employed, a re-survey was made over the old route, the map completed, and the ditch ordered constructed and completed in accordance with the prayer of the original petition. James H. Hill, John Bollweg (the petitioner here) and Christian Fessler signed releases for the right of way, a special assessment was made, from which no appeal was ever taken by any one, a large portion of the work had been done and contracts for most all of the work had been let, (John Bollweg agreeing to contract for the work across his own land,) when this petition for a writ of *certiorari* was filed. Attorneys for appellant raised various questions for consideration and decision.

"LACEY, J.: It appears from an examination of the record in the case that the appellee drainage district was fully organized according to law, including that portion of territory, extending to the DuPage river, attempted by subsequent order of the commissioners to be dropped from the district.

"The portion of the record sought to be quashed by this proceeding was an order of the board of drainage commissioners entered of record and passed at a regular meeting of the board, October 28, 1893, annulling and rescinding a former order of the commissioners March 25, 1887, whereby the boundaries of the district were attempted to be changed from the original organization, so that the boundary of the lower end of the district would terminate on the west line of the land of John Weisbrook, and the ditch would also terminate there.

"The questions have been ably presented by the attorneys on both sides and many points raised, but in the view we take of the matter it will not be necessary to notice all the questions presented.

"It appears to us, from an examination of the record, that the district was legally and finally organized in December, 1886, and in that organization the portion excluded by the order referred to, of March 25, 1887, was included. We are of the opinion that the commissioners had no power, after the original organization, to limit the district or change the boundaries except under the provisions of the Farm Drainage act, as provided in section 47½, (R. S. Starr & Curtis,) which authorizes a dissolution; and the district, in whole or in part, cannot be dissolved otherwise, and a district, possibly, cannot be partially dissolved under that section,—a question we need not decide. There is no provision of the statute authorizing a change of the district after it is fully organized. But if such an order changing the district is invalid, no reason is perceived why such an order may not be revoked by the drainage commissioners.

"The order of restriction was void, and the subsequent order annulling it could only have the effect to undo the void act. Such order should therefore stand of record for the purpose of removing a cloud on the district organization. The judgment of the court below quashing the writ of *certiorari* is therefore affirmed."

CHARLES WHEATON, and T. M. MANNING, (HARVEY B. HURD, of counsel,) for appellant.

E. H. GARY, J. F. SNYDER, and GEORGE W. BROWN, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

A careful examination of this record convinces us that the material question presented is as to the act of the commissioners in rescinding the resolution of the commissioners of March 25, 1887, which was rescinded by the resolution of October 28, 1893. The resolution of March 25, 1887, was invalid and unauthorized, and did not effect

a change of the boundaries of the district as originally organized. The original organization was in pursuance of the statute, and created a legal district. No change in the boundaries of the district being effected by the resolution of March 25, 1887, they were the same as they were prior to that resolution. The resolution of October 28, 1893, did not operate to extend the boundaries of the district, which still remained as they were before the resolution of 1887. The only effect of the resolution of 1893 was to correct the records of the district. Neither resolution changed the boundaries of the district. The statement of the case as made by the Appellate Court states it as shown by this record.

We concur in the opinion of Mr. Justice LACEY, and the judgment of the Appellate Court for the Second District is affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT took no part in the decision of this case.

ALFRED ENNIS

v.

THE PULLMAN PALACE CAR COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

1. **LIMITATIONS**—when Statute of Limitations begins to run against claim of attorney for services. Where an attorney is conducting a single suit, the Statute of Limitations will not begin to run against the claim for his fee until the suit is ended or his retainer terminated in some other manner.

2. **SAME**—when running of statute is not postponed until the service is ended. Where an attorney employed as counsel under a general agreement fixing no term of service is to be paid by the month, a right of action accrues for each month's salary upon the first day of the succeeding month, against which right the Statute of Limitations at once begins to run, although the service is continued several years.

165	161
168	452
60a	615
165	161
75a	123
165	161
d196	*602
165	161
209	21
165	161
114a	10 28

3. SAME—*acknowledgment of barred debt must clearly raise implied promise to pay.* An acknowledgment of a debt barred by statute, in order to raise an implied promise to pay, must unqualifiedly admit the debt to be due and unpaid, nothing being then said or done to rebut the implication.

4. SAME—*what is not a sufficient acknowledgment of a barred debt.* The words "I will settle this thing," by an employer, even if construed with his former statements that his employee's salary was unadjusted, will not raise an implied promise to pay the claim, when the employee, during the period claimed for, was receiving a fixed sum each month and receipting for "all claims in full to date."

5. SAME—*effect upon running of statute of attempts at compromise.* A party should not trust so long to the anticipated outcome of negotiations for a settlement of his claim as to lose his legal remedy by lapse of time. (*Language of Railway Conductors' Ass. v. Loomis*, 142 Ill. 560, criticised.)

6. SAME—*when instruction concerning acknowledgment of barred debt is properly refused.* Where words attributed to a debtor as sufficient to remove the statutory bar from his debt are accompanied by circumstances repelling an inference of a promise to pay, an instruction which withholds such circumstances from the consideration of the jury is properly refused.

7. APPEALS AND ERRORS—*harmless error in instruction will not reverse.* A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured thereby.

8. ACCORD AND SATISFACTION—*acceptance of part of a disputed claim "in full" discharges debt.* Where a party whose claim is unliquidated and in dispute accepts a part thereof and executes a receipt therefor "in full of all claims to date," such payment will be regarded as an accord and satisfaction.

9. SAME—*when question of accord and satisfaction is one of law.* Where the facts in respect to an accord and satisfaction between parties are ascertained, their effect is purely a question of law, and are not to be submitted to the jury.

10. EVIDENCE—*proof must be clear to impair force of written receipt.* Though a written receipt may be explained by parol, yet it is *prima facie* evidence of the most satisfactory character of the facts recited therein, and to impair its force the proof must be clear.

11. SAME—*written receipt retains its prima facie effect when contradictory evidence does not preponderate.* Where the proof offered to impair the force of an unambiguous written receipt is neutralized by the proof offered in its support, the receipt must be given its *prima facie* effect.

Ennis v. Pullman Palace Car Co. 60 Ill. App. 398, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

This is an action of assumpsit, commenced on September 30, 1893, by the appellant against the appellee company to recover for professional services as counsel and general counsel for appellee for about four years and five months. The declaration contains only the common counts, and the plaintiff seeks to recover as on a *quantum meruit* for services from June 7, 1884, to the end of October, 1888. The first plea was the general issue except as to \$1000.00, the company pleading the tender of \$1000.00, being the amount of two sums of \$500.00 each tendered for the months of September and October, 1888. The second plea was the Statute of Limitations of five years. There was replication to the plea of tender, and replication *de injuria* to the Statute of Limitations. The trial was before a jury, and resulted in a verdict of \$180.00 in favor of appellant. Judgment was rendered upon the verdict. Appeal was taken by appellant to the Appellate Court, and the latter court has affirmed the judgment of the circuit court. The present appeal is prosecuted by the appellant from such judgment of affirmance.

The facts material to an understanding of the questions involved are substantially as follows: Appellant is by profession a lawyer and acted as the legal counsel of appellee from June 7, 1884, to September 26, 1888, on which latter day he resigned his position as counsel, the resignation to take effect on October 1, 1888; he remained, however, in the service of appellee until October 31, 1888. Between June 7, 1884, and July 1, 1885, appellant drew on account of his services different amounts, ranging all the way from \$200.00 to \$500.00, and in one instance as much as \$800.00. For the amounts thus drawn vouchers or receipts were given to appellee, reciting that the

amounts so received were "on account" or "on account of services."

On July 1, 1885, appellant's old vouchers were surrendered and a new one taken, dated July 1, 1885, for \$6300.00, itemized as stated in the opinion. The receipt dated July 1, 1885, for \$6300.00, is hereinafter set out in full.

The appellee also introduced in evidence a receipt signed by the appellant for personal services rendered by him to the appellee as general counsel during the month of July, 1885, and containing the following words, to-wit: "Received from Pullman's Palace Car Company \$500.00 in full for services as reported above and in full of all claims to date." It was also shown that he received appellee's check for \$500.00 for such services during the month of July, 1885, which check was paid August 1, 1885. Appellee also introduced in evidence vouchers similar to the one for July, 1885, being one for each of the successive months from August, 1885, to July, 1888, inclusive, except the months of December, 1886, January, 1887, February, 1887, March, 1887, and April, 1888. The vouchers so introduced were thirty-one in number, and each of them was for \$500.00, signed by appellant and in similar form, with proper change of date and months, as the voucher for July, 1885, set forth above. For the five months from December, 1886, to April, 1888, inclusive, the appellee introduced in evidence its five checks upon the Merchants' Loan and Trust Company for \$500.00 each in favor of appellant, and endorsed by him, and dated each the first day of the month following the months last above named, respectively. Appellee also introduced a receipt signed by Alfred Ennis, dated September 1, 1888, for personal services rendered by him to appellee as general counsel during the month of August, 1888, for \$500.00, and containing the same words as the receipt for July, 1885, as above quoted. It is shown, that the \$500.00 named in this receipt was actually paid to appellant by appellee's check drawn on the Merchants' Loan and Trust

Company in favor of appellant and endorsed by him, and stamped on its face as paid on September 15, 1888.

Appellant now claims, that his services during said period from June, 1884, to October, 1888, inclusive, were worth from \$15,000.00 to \$20,000.00 a year; that his salary as general counsel for appellee was never fixed, and that the payments made to him at the rate of \$300.00 for June, 1884, and \$500.00 for each month after that during his service, were all "on account of," and not in full payment for his services. The object of the present suit is to recover the excess, which his services are claimed to have been worth for the period aforesaid, over and above the \$500.00 per month, or \$6000.00 per year, which he actually received, and for which he executed receipts as aforesaid.

Appellant claims, that the amount of salary, which he was to receive as appellee's legal counsel, was never really settled or agreed upon between himself and George M. Pullman, the president of the appellee company. He claims, that, at various times during the period of his service, he endeavored to induce Pullman to fix his salary, and that Pullman always said, at every interview which he had with him, that his salary should be fixed and made satisfactory, and dated back. He does not say, however, that any time was ever set, when his salary should be fixed or agreed upon. He says that Pullman always said to him, "I have always said to you that your salary should be fixed and dated back and be made all right." He states that this was said to him some time in September, 1888, before his resignation on the 26th day of that month. He also says that on November 7, 1888, after his resignation had taken effect, he had an interview with Pullman at his office in Chicago at two o'clock in the afternoon, and Pullman said he had an engagement at that time, but said to him: "Come back here at three o'clock and we will take up the matter of your salary and settle it," or "settle this thing;" that he went back at three o'clock, but Pullman never returned.

Pullman swears, that up to the first of July, 1885, he regarded appellant as being on trial, and authorized him to draw for his services sometimes \$300.00 a month, and sometimes \$400.00 a month, and sometimes \$500.00 per month, during said period of thirteen months; but he swears, that in the early part of July, 1885, about a year after appellant came to him, he took up the question of his salary with him, and fixed the compensation at \$500.00 per month, and dated it back twelve months to July of the previous year,—that is, 1884,—stipulating that the month of June, 1884, should go in at \$300.00; that he assumed that that was satisfactory to appellant; that \$500.00 per month was agreed upon; that appellant did not claim more than that; that, since the date of that agreement about the first of July, 1885, appellant has never claimed to him, that there was any unadjusted salary; that nothing was ever said about dating back after July, 1885; that from that time the question was settled; that the salary remained fixed at that sum for the balance of the service; that he never informed appellant in any way that he would grant an increase of salary; that there was no question of unadjusted salary in the spring of 1888 at his house. Pullman also swears, that he heard a great deal from appellant during the year preceding July 1, 1885, about fixing his salary; that “we got together and fixed it,” and that the voucher for \$6300.00, dated July 1, 1885, was made out in accordance with the agreement; that appellant agreed with him that his compensation should be \$500.00 a month.

It appears from the evidence, that, on October 17, 1889, appellant addressed to Pullman the following letter: “Referring to our last meeting for the purpose of settling the matter of my salary as general counsel of your company, I will now inquire as to when it will be agreeable to you to take up the further consideration of the same.” To this letter Pullman sent the following reply, also dated October 17, 1889: “Replying to yours of this date

I beg to say that I have had no meeting with you for the purpose of settling the question of salary, since it was fixed by agreement something more than four years ago, in accordance with which it has been settled monthly by payment and receipt. Upon inquiry of the secretary I find that the vouchers were duly audited in your favor and checks made out for your salary for the last two months of your service, and that you have been duly notified that the checks were ready for you. If you desire to see me, I will be happy to meet you here at any time when it will be convenient."

The vouchers above referred to for \$6300.00, and for July, 1885, and for August, 1888, appear in the record in the following shape, to-wit:

"Pullman's Palace Car Company,

To Alfred Ennis, Dr.—Address, Chicago.

For personal services as shown below,.....188 .

Nature of services rendered.	Time.	Rate.	Amount.
	Months.	Days.	
General Counsel, Chicago.....	1		\$300
12		500
			6000

June 1, 1884, to July 1, 1885..... \$6300

W. W. Y.

Approved—GEO. M. PULLMAN, *President*.

Examined and found correct.

Received of Pullman's Palace Car Company \$5300.00, in full for services as reported above, and in full of all claims to date.

July 1, 1885.

ALFRED ENNIS."

"Pullman's Palace Car Company,

To. A. Ennis, Dr.—Address, Chicago.

For personal services during the month of July, 1885.

Nature of services and where rendered.	Time.	Rate.	Am't.
	Months.	Days.	
General Counsel, Chicago.....	1		\$500

Examined and found correct.

Received from Pullman's Palace Car Company \$500.00, in full for services as reported above, and in full of all claims to date.

August 1, 1885.

ALFRED ENNIS."

"*Pullman's Palace Car Company,*

To Alfred Ennis, Dr.—Address, Chicago.

For personal services during the month of August, 1888.

Nature of services and where rendered. Time. Rate. Am't.

Months. Days.

General Counsel, Chicago.....1 \$500.00

Examined and found correct.

Received of Pullman's Palace Car Company \$500.00, in full for services reported above, and in full of all claims to date.

September 1, 1888.

ALFRED ENNIS."

S. S. GREGORY, for appellant:

A hiring for an indefinite period is taken to be from year to year. *Davis v. Gorton*, 16 N. Y. 255.

Where payments are made they take the entire claim out of the statute, even where the court holds that it commences to run at the end of each year, and not when the service is terminated. *Smith v. Velie*, 60 N. Y. 106; *Demise v. Demise*, 110 N. Y. 562.

Negotiations and assurances of adjustment prevent the statute from running. *Railway Conductors' Ass. v. Loomis*, 142 Ill. 560.

Unless there is a statute requiring an express promise, an acknowledgment of an existing indebtedness, unaccompanied by an expression of intention not to pay it, is sufficient to revive the debt or prevent the running of the statute. *Davis v. Steiner*, 14 Pa. St. 275; *Lord v. Harvey*, 3 Conn. 370; *Newlin v. Duncan*, 1 Harr. 204; *Thompson v. French*, 10 Yerg. 453; *Ross v. Ross*, 20 Ala. 105; *Williams v. Finney*, 16 Vt. 297; *Taylor v. Miller*, 113 N. C. 340; *Henry v. Root*, 33 N. Y. 526; *Custy v. Donlan*, 159 Mass. 245; *Wooters v. King*, 54 Ill. 343; *Ditch v. Vollhardt*, 82 id. 134; *Schmidt v. Pfau*, 114 id. 494.

Where the terms of an acknowledgment of a debt barred by the Statute of Limitations are ambiguous, their meaning and effect are questions for the jury. *Gould v. Shirley*, 2 M. & P. 581.

The jury is to draw the inferences as to intent of the party making an admission of a debt, where it is claimed to be thus revived. *Sidwell v. Mason*, 2 H. & N. 306; *Black's Exrs. v. Reybald*, 3 Harr. 528; *DeForest v. Hunt*, 8 Conn. 179.

A receipt is open to explanation. *Walrath v. Norton*, 10 Ill. 437; *Frink v. Bolton*, 15 id. 344; *Ditch v. Vollhardt*, 82 id. 134; *Rosenmueller v. Lampe*, 89 id. 212; *Neil v. Handley*, 116 id. 418; 1 Taylor on Evidence, sec. 859; 2 id. sec. 1134; 2 Wharton on Evidence, 1064; *Lee v. Railway Co.* 6 L. R. Ch. App. 527; *Railroad Co. v. Davis*, 35 Kan. 464; *Fire Ins. Ass. v. Wickham*, 141 U. S. 564.

F. B. DANIELS, (WILLIAMS, HOLT & WHEELER, of counsel,) for appellee:

An indefinite hiring at so much per day, per month or per year is a hiring at will, and may be terminated by either party at any time. *Finger v. Koch*, 13 Mo. App. 311.

Claims for service are barred in the same manner as other debts, reckoning from the time when an action would lie. *Davis v. Gorton*, 16 N. Y. 255; *Taylor v. Sonora*, 17 Cal. 594; *Freeman v. Freeman*, 65 Ill. 106; *In re Gardner*, 103 N. Y. 555; *Mim's Exrs. v. Sturtevant*, 18 Ala. 366.

Several insufficient acknowledgments will not constitute a sufficient one. *Patterson v. Neuer*, 165 Pa. St. 74.

To remove the bar of the Statute of Limitations it is incumbent on the plaintiff to prove an express promise to pay the money, or a conditional promise with a performance of the condition, or an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay. It must be of such character as to clearly show a recognition of and intention to pay the debt. *Carroll v. Forsyth*, 69 Ill. 131; *Murphy v. Holway*, 25 Ill. App. 555.

The statute bars the claim of any attorney as it does the claims of other persons, when his services may be measured in a similar way as the services of others. *Mosgrove v. Golden*, 101 Pa. St. 605.

A judgment will not be reversed where error has intervened, if it shall appear from the whole record that such error could not reasonably affect the result. *Ochs v. People*, 124 Ill. 425.

All that is required to be a case of accord and satisfaction is an unliquidated demand, an agreement as to its amount, and a payment of that amount. Bishop on Contracts, sec. 56; 2 Greenleaf on Evidence, sec. 28; Bouvier's Law Dic. "Accord;" *Rosenmueller v. Lampe*, 89 Ill. 212; *Donohue v. Woodbury*, 6 Cush. 148; *McDaniels v. Bank*, 29 Vt. 230; *Stockton v. Fry*, 4 Gill, 406.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

By the eighth instruction given to the jury they were told, that, if they should find from the evidence in the case, that there was no contract or agreement between plaintiff and defendant as to the amount of plaintiff's compensation, then the plaintiff was entitled to recover for the months of September and October, 1888, whatever the evidence showed his services were fairly and reasonably worth, less any amounts that may have been paid on account of those months. The defendant below; appellee here, produced no vouchers signed by the plaintiff below, appellant here, for services during September and October, 1888. It appears, however, that appellee tendered to appellant two checks of \$500.00 each for such services; but appellant declined to take the same or to sign vouchers for the same at the time of the tender. The sum of \$1000.00, being the amount of these two checks, was paid into court, and subsequently withdrawn by appellant's attorney. In view of the giving of the eighth instruction, there is nothing of which appellant can justly complain as to the manner in which the question of his compensation for September and October, 1888, was presented to the jury. It is difficult to understand upon what theory the jury rendered a verdict in

favor of the appellant for \$180.00. He introduced testimony tending to show, that his services during the four years and five months of his employment were worth from \$12,000.00 to \$20,000.00 per year or from \$1000.00 to over \$1600.00 per month. The appellee introduced no evidence as to the value of appellant's services, resting upon the defense that an agreement had been made with him to pay him \$500.00 per month, and that he had been paid \$500.00 per month for the whole time of his employment. If the jury intended to find, that there was no such agreement, and that he was entitled to recover what his services were reasonably worth, it is hard to discover such intention in the peculiar verdict rendered by them. The appellee makes no objection to the verdict and judgment for \$180.00 and is willing to pay the same; the appellant complains that it is too small. But no error being pointed out either in the instructions, or in the rulings upon the evidence, so far as they apply to September and October, 1888, it remains only to consider such instructions and rulings as applicable to the period preceding September 1, 1888.

The trial court instructed the jury in substance, that the appellant was not entitled to recover for any services rendered by him prior to the first day of September, 1888, on the ground that his right of action therefor was barred by the five years' statute of limitations. As this suit was begun on September 30, 1893, the five years began to run on September 30, 1888, and, of course, any services rendered before September 1, 1888, were rendered more than five years before the beginning of the suit.

The contention of appellant is, that he entered the service of appellee about June 1, 1884, under no definite agreement as to term of service or compensation. There seems to be some ground for this contention, so far as the period of service from June 1, 1884, to July 1, 1885, is concerned. It cannot be said, that, during these thirteen months, the employment was an employment by the

month, or for a particular sum per month; the amounts paid for services during this period were paid at irregular times and in different amounts. But on July 1, 1885, the appellant and George M. Pullman, the president of the appellee company, who had authority, under the by-laws of the company, to fix the salaries of its officers and employees, had a settlement, and, as a result thereof, the voucher for \$6300.00 was prepared and executed. Up to July 1, 1885, appellant had drawn, on account of his services, \$5900.00 in various amounts and at various times, and a check for \$400.00 was then given him, so as to make the total amount theretofore drawn by him the sum of \$6300.00. The voucher for that amount is, in form, a bill made out in his favor against appellee as debtor, and recites that there is due to him from appellee for personal services as general counsel for one month \$300.00, and for twelve months \$6000.00, amounting to \$6300.00 for the period from June 1, 1884, to July 1, 1885. This bill is marked "approved" by appellee's president, and at the foot of it appellant, over his own signature, acknowledges the receipt of \$6300.00 "in full for services as reported above and in full of all claims to date." The "services as reported above" are services for June, 1884, at \$300.00, and for the succeeding twelve months from July 1, 1884, to July 1, 1885, at \$500.00 per month, or \$6000.00 per year. Whether the hiring prior to July 1, 1885, be regarded as a hiring by the month or by the year, the right of action for services prior to that date was certainly barred by the statute, as they were rendered more than eight years before the bringing of the present suit.

After July 1, 1885, and down to September 1, 1888, a different policy seems to have been pursued from that which controlled the action of the parties prior to that date; that is to say, the amounts paid for services were not paid at irregular times and in different sums, nor did the vouchers recite as before, that the amounts received were "on account," or "on account of services;" but the

amount paid for each month was exactly \$500.00, and it was paid on or about the first day of the month succeeding the month for which it was paid; and for each one of such payments, except about five thereof, appellant signed a voucher acknowledging the receipt of \$500.00 for personal services as general counsel "in full for services" for each separate month, "and in full of all claims to date."

After July 1, 1885, the hiring of appellant was a hiring by the month, and hence the Statute of Limitations began to run against the right of action for the amount due for each month's services on the first day of the succeeding month.

It seems to be claimed, that this is a case of indefinite hiring, and that the statute did not begin to run until the whole service was ended. We cannot concur in this view. Where an attorney is conducting a single suit, it has been held, that the Statute of Limitations cannot commence running, until the services contracted for have been performed by the ending of the suit, or by the termination of the retainer in some other mode. (*Walker v. Goodrich*, 16 Ill. 341). But where attorneys are regularly employed at a salary given for advice and legal superintendence and other services rendered from day to day, there is no reason why they should not stand upon the same footing as other salaried employees, so far as the Statute of Limitations is concerned. (*Mosgrove v. Golden*, 101 Pa. St. 605; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Hale's Exrs. v. Ard's Exrs.* 48 Pa. St. 22; *Phillips v. Broadley*, 11 Jur. 264).

Ordinarily, when a man is employed under a general agreement which fixes no term of service, and continues in service a long time, the hiring will be treated as a hiring by the year. (*Mosgrove v. Golden*, *supra*; *Davis v. Gorton*, 16 N. Y. 255). In case, however, of such long continued employment, the statute will ordinarily bar a claim for all outside of the five years immediately before the com-

mencement of the action, unless there is evidence to take it out of the operation of the statute. (*Mosgrove v. Golden, supra; Thompson v. Reed, Adm.* 48 Ill. 118; *Freeman v. Freeman*, 65 id. 106). But the rule, that, when the service is not under an express contract and is continued for a long time, the hiring will be understood to be by the year, gives way if the circumstances indicate a less period. The compensation will be regarded as being payable by the month, if such monthly payments are in accordance with the usual terms of such employment, or with the usual course of dealing between the parties themselves. (*Mosgrove v. Golden, supra; Davis v. Gorton, supra*). In the case at bar, the fact that for a period of more than three years the appellee paid appellant on or about the first day of each succeeding month for his services during the preceding month, and that appellant executed receipts for such payments as soon as made, raises the implication that the term of employment was by the month. If a person is employed by the month, and is to be paid at the end of each month, a right of action accrues and, consequently, the statute begins to run at the end of each month, and will bar that part of the wages which accrued more than five years before the action was brought, although the service was continued for several years. (1 Wood on Limitations,—2d ed.—sec. 120). In other words, where wages are due at fixed times, the statute runs from the date when due. (*Mirus v. Sturtevant*, 18 Ala. 359; *Davis v. Gorton, supra; Rider v. Union India Rubber Co.* 5 Bosw. 85; *Turner v. Martin*, 4 Rob. 661; *Butler v. Kirby*, 53 Wis. 188; *Phillips v. Broadley, supra*; 13 Am. & Eng. Ency. of Law, p. 726; *Beach v. Mullen*, 34 N. J. L. 344; *In re Gardner*, 103 N. Y. 533).

It follows from what has been said, that the appellant's right to sue for his services for each of the months prior to September 1, 1888, was barred after the lapse of five years from the latter date, unless there is some legal bar to the operation of the statute. The appellant claims,

that the evidence shows such acknowledgments as toll the statute.

The only words, claimed to have been uttered by the representative of appellee within five years before the beginning of this suit, which are alleged to have amounted to an acknowledgment of indebtedness, are those which are said by appellant to have been used by Pullman on November 7, 1888. Those words are: "Come back here at three o'clock and we will take up the matter of your salary and settle it," or "settle this thing." Pullman denies, that he used any such words, but, assuming that appellant is correct in saying that they were used, do they amount to such an acknowledgment as implies a new promise to pay, so as to stop the running of the statute?

It has been said, that it is not the acknowledgment, which renews or revives the debt; it is the new promise to pay the debt, made within the five years, which prevents the operation of the statute; and the acknowledgment will only have the effect of reviving the cause of action, when it is of such a character that a promise to pay the debt can be implied from it. The efficacy of the acknowledgment rests in the fact, that it gives rise to the inference of a promise to pay. If the implication of a promise to pay is rebutted by anything accompanying the admission or acknowledgment of the debt, such admission or acknowledgment cannot prevail. Where there is no express promise, an acknowledgment, such as will give rise to the implication of an implied promise, ought to contain an unqualified and direct admission of a previous debt, barred by the Statute of Limitations, as being still unpaid and subsisting. (*Hunter v. Kittredge's Estate*, 41 Vt. 359; *Henry v. Root*, 33 N. Y. 526; *Custy v. Donlon*, 159 Mass. 245; 13 Am. & Eng. Ency. of Law, p. 750). The decisions of this court are in line with these principles. We have held in a number of cases, that, in order to remove the bar of the statute, the plaintiff must prove either an

express promise to pay the money, or a conditional promise with a performance of the condition, or an unqualified admission that the debt is due and unpaid, nothing being said or *done* at the time rebutting the presumption of a promise to pay; and that the promise to pay the debt must be of such a character as clearly to show a recognition of the debt and an intention to pay it. (*Ayers v. Richards*, 12 Ill. 146; *Parsons v. N. I. C. and I. Co.* 38 id. 430; *Norton v. Colby*, 52 id. 198; *Carroll v. Forsyth*, 69 id. 127). Now, it is quite clear, that the words attributed to Pullman at the interview of November 7, 1888, do not come up to the requirements thus indicated. They do not show any recognition of indebtedness by appellee for salary over and above the \$500.00 per month which had been regularly paid for years, nor do they show any intention to pay any such salary. The words in question contain no unqualified admission of a subsisting debt due and unpaid. If it was said: "I will settle this thing," the reference was not to a settlement of a prior conceded indebtedness upon book accounts, the remedy upon which had been barred by the statute; but the expression was rather the indication of a willingness to hear what was to be said upon the subject of an increased salary, and to "settle" or end the matter.

It is contended, however, that the words said to have been used on November 7, 1888, should be considered in connection with words used in conversations held before September, 1888, and before the commencement of the period of five years preceding the institution of this suit. Appellant swears that, in such conversations held from time to time during a period of more than four years after June 7, 1884, Pullman told him, that his salary should be fixed and dated back to the beginning of his service in June, 1884. Pullman denies under oath that any such conversations were had, but assuming what appellant says to be true, can such prior conversations be carried forward to strengthen and help out the alleged

acknowledgment made on November 7, 1888? It may be a question, whether conversations, relied upon as containing an acknowledgment sufficient to take a barred claim out of the statute, should not be considered separately. "Several insufficient acknowledgments will not constitute a sufficient one." (*Patterson v. Neuer*, 165 Pa. St. 66). But, if the conversations in this case from June, 1884, to November, 1888, can all be considered together in determining whether there was in them a sufficient acknowledgment by appellee of an indebtedness for salary over and above what was actually paid, they must not only show an unqualified admission of the indebtedness claimed, but it must appear that nothing was said or *done* at the time of their occurrence, which rebuts the presumption of a promise to pay such indebtedness. The evidence is clear, that, while the conversations sworn to by appellant were taking place during the period aforesaid, appellee was paying him \$500.00 on the first day of each month, and presenting him with vouchers, which he signed, reciting that such sums of \$500.00 each were received in full of services for each of such months, "and in full of all claims to date." Appellant says, that he was making claims for more salary during more than four years, and yet, while pressing such claims, he was at the same time signing vouchers every month in full of all claims. These monthly payments and the execution of these monthly vouchers were acts done, which must be regarded as taking place at or about the time of the conversations, and must be considered in connection with them, and as bearing upon their interpretation, when such conversations are presented as acknowledgments of indebtedness set up in bar of the running of the Statute of Limitations. Considered thus as things "done at the time," they rebut the presumption of a promise to pay. The fact, that appellee made the monthly payments of \$500.00 each and obtained from appellant these monthly vouchers therefor without any fraud or misrepresenta-

tion practiced upon him, indicates a denial of liability on the part of appellee for any more indebtedness than that specified in the vouchers. While an acknowledgment, which is of such a nature that a promise to pay the debt can be implied from it, will take the debt out of the statute, yet it is well settled, that, "when the admission is accompanied by a denial of liability existing at the time of the admission, no promise to pay the debt can be implied." (*Hunter v. Kittredge's Estate, supra*).

The statements, to the effect that the salary would be fixed and dated back, which are alleged to have been made often during the whole period of service, and at least once after its termination, are said to have postponed the running of the statute until the salary should be fixed, or its payment refused after being fixed. The statements so made are treated by appellant's counsel as negotiations or assurances of adjustment, which should have the equitable effect of preventing the statute from running. To sustain this position reference is made to the case of *Railway Conductors, etc. Benefit Ass. v. Loomis*, 142 Ill. 560. It was there said, that, where an insurance company leads a party to delay the bringing of suit by holding out hopes of adjustment or by making promises to pay, it should be estopped from taking advantage of such delay by pleading the Statute of Limitations. We are satisfied, upon further reflection, that the language there used goes too far, and should be limited in its application to cases, where the insurance company seeks to take advantage of the delay by relying upon the limitation clause in its own policy requiring suit to be begun within a certain time. Such is the purport of the cases there referred to; and what was said upon this subject was not necessary to the decision there, as there was nothing in that case tending to establish a waiver by the company of its right to plead the Statute of Limitations. Where the parties expressly agree together to suspend legal remedies for the purpose of making inquiry into the

merits of a disputed claim, or for the purpose of effecting an adjustment thereof, or in order to await the result of negotiations in reference thereto, advantage should not be taken of the Statute of Limitations in respect to the time employed for such purpose; but a party should not be allowed to trust too long to the anticipated outcome of such proceedings and until his right to legal remedies has been lost by lapse of time. (*East India Co. v. Paul*, 7 Moore's Priv. Counc. Cases, 85; *Gooden v. Insurance Co.* 20 N. H. 73; *Amy v. Watertown*, 130 U. S. 320; *Randon v. Toby*, 11 How. 493; *Gaylord v. Van Loan*, 15 Wend. 308; *Utica Ins. Co. v. Bloodgood*, 4 id. 652; *Shapley v. Abbott*, 42 N. Y. 443; *Crane v. French*, 38 Miss. 503). It cannot be said here, that the appellant was lured into any unnecessary delay in bringing suit for additional salary, when he was every month required to sign, and did sign, a voucher in full for his services for such month, and in full of all claims for such additional salary to the date of his signature.

It is furthermore urged in behalf of the appellant, that it should have been left to the jury to determine whether or not there was such an acknowledgment of indebtedness as would stop the running of the statute. It is true, that in many cases the question must be left to the jury under proper instructions to determine whether the defendant has acknowledged the debt or promised to pay it. But in *Roll v. Morrison*, 1 Pet. 362, it was said by Justice STORY: "If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expressions be equivocal and indeterminate leading to no certain conclusions, but at best to probable inference, which may affect different minds in different ways, we think they ought not to go to the jury as evidence of a new promise to revive the cause of action." This language was quoted with approval in *Carroll v. Forsyth*, 69 Ill. 127, and in *Norton v. Colby*, 52 id. 198. (See, also, *Murphy v. Holway*, 25 Ill. App. 554). As has already been stated, there were here accompanying circumstances

to be found in the execution of the monthly vouchers, which repelled the presumption of a promise or intention to pay any additional salary. The words, attributed by the appellant to the president of the appellee company, considered in connection with the accompanying circumstances here referred to, could lead to no certain conclusion, but at best only to probable inference as to any intention to pay. But even if this were not so, the instruction asked by appellant upon the subject of acknowledgment was properly refused, because it withheld from the consideration of the jury the question whether or not there were any accompanying circumstances of the character indicated. (*Foster v. Smith*, 52 Conn. 449). If they were such as to rebut the presumption of a promise to pay, there was no such unqualified acknowledgment or admission of the debt as the authorities require.

But even if there were a doubt as to the correctness of the instructions last referred to, this judgment ought not to be disturbed. If this case was reversed and sent back, another trial could not possibly result in a more favorable verdict for the plaintiff. A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court. (*Gray v. Merriam*, 148 Ill. 179; *Chicago Public Stock Exchange v. McClaghry*, id. 372).

There are two views which may be taken of the vouchers executed by appellant. In the first place, they may be regarded as instruments embodying agreements of accord and satisfaction. "If there is an unliquidated claim, or the sum due is in dispute, the payment of any agreed sum, or the promise to pay it, in full discharge, will be deemed to have proceeded on a sufficient consid-

eration, and will be adequate." (Bishop on Contracts, sec. 56). Where a claim is unliquidated and the amount due is not ascertained and fixed, the payment and acceptance of a certain sum, as a satisfaction, is a full discharge of the demand. (*Donohue v. Woodbury*, 6 Cush. 148; *Stockton v. Frey*, 4 Gill, (Md.) 406; *McDaniels v. Bank of Rutland*, 29 Vt. 230). "If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt, is a good satisfaction." (1 Am. & Eng. Ency. of Law,—2d ed.—p. 419).

By the undisputed testimony of both appellant and Pullman, the amount of appellant's claim for services was unsettled up to July 1, 1885. On that day, or soon thereafter, the voucher for \$6300.00 was executed, and the sums therein named were paid and accepted in full of services and of all claims up to that date. Pullman swears that, after July 1, 1885, the matter of salary was settled and nothing was said to him about an unadjusted claim therefor, but appellant swears that he was demanding more salary after that date and that his claim therefor was unsettled; and the amount due to him unfixed. He is, therefore, committed in favor of unliquidated demands after that date; and, while his demands were thus unliquidated, the monthly vouchers, showing the payment and acceptance of certain sums in full of services and all claims to date, were executed. It follows, that all the vouchers can well be regarded as agreements of accord and satisfaction.

In *Rosenmueller v. Lampe*, 89 Ill. 212, a party, who was employed by the trustees of a church to perform certain services, was paid \$100.00 by them on July 10, 1876, and on that day executed the following receipt: "Received of J. C. Mueller, treasurer of the Catholic church, \$100.00, in full for salary as teacher, and services in church, from September 1, 1875, to July 1, 1876;" and we there said: "The \$100.00 would appear to have been paid in settlement of a dispute between the parties, appellee claiming

more at the time, according to the testimony. It is, then, a good accord and satisfaction."

If these vouchers thus embodied agreements of accord and satisfaction, the rule applies that, where the facts in respect to the arrangement or accord between the parties are ascertained, their effect is purely a question of law, and is not to be submitted to the jury. (2 Greenleaf on Evidence,—15th ed.—sec. 28a; *Vedder v. Vedder*, 1 Denio, 257).

But let it be supposed, in the second place, that the vouchers are, as is claimed by appellant, mere receipts, which can be explained or contradicted by parol evidence. It is true, that a written receipt may be explained by parol; but it is *prima facie* evidence of the facts recited in it; and, the evidence furnished by it being of the highest and most satisfactory character, its force can only be impaired by testimony which is convincing. The proof, offered to explain it, must be clear and unmistakable. It must be overcome, if overcome at all, by a clear preponderance of the evidence. (*Winchester v. Grosvenor*, 44 Ill. 425; *Rosenmueller v. Lampe*, *supra*; *Neal v. Handley*, 116 Ill. 418).

In the case at bar, the receipts introduced are *prima facie* evidence, that appellant was paid \$500.00 per month in full discharge of all that was due him for legal services during the period of his employment by appellee, and that he accepted the amounts so paid as a satisfaction of all claims for salary. Appellant swears, that the voucher for \$6300.00 was not executed in full payment for all that was due to him on July 1, 1885, but Pullman swears that he and appellant then agreed upon \$500.00 per month as the amount of his compensation, and that the voucher of that date was executed in pursuance of such agreement. The oath of the appellant stands over against the oath of the other party to the transaction. The sworn statements of the two witnesses are neutralized. The testimony of Pullman is "quite as clear, quite

as reasonable, and quite as conclusive upon the point in controversy as that of appellant, and if they stand equal, the receipt must have its *prima facie* effect." (*Levi v. Karrick*, 13 Iowa, 344; *Neal v. Handley*, *supra*; *Stapleton v. King*, 33 Iowa, 28; *Fuller v. Crittenden*, 9 Conn. 364.

The same observations apply to the vouchers executed after July 1, 1885. Notwithstanding the *prima facie* evidence furnished by these vouchers that appellant's compensation was adjusted and fixed at their respective dates, appellant swears that it was not fixed or adjusted, and that Pullman said he would fix it and date it back. On the other hand, Pullman swears with great positiveness, that it was fixed and adjusted, and that he never said that he would fix it. The statements of the parties stand equal, and the vouchers must have their *prima facie* effect. Appellant does not deny that he executed these vouchers and received the money mentioned therein.

The receipts are unambiguous in their terms. They are affirmative, and, until rebutted, conclusive evidence of what they contain. They have not been rebutted. The testimony, introduced for the purpose of impairing their force, is not convincing. The proof offered to explain them is not clear and unmistakable. They have not been overcome by a clear preponderance of the evidence. The burden was thrown upon the appellant to impeach them by showing that they were "obtained by fraud, executed without proper knowledge of the facts, mistake, or the like. With him was the laboring oar as to this issue, therefore." They have not been thus impeached. (*Levi v. Karrick*, *supra*).

The receipts being unimpeached and standing as conclusive evidence of what they contain, no just purpose would be subserved by reversing the judgment and remanding the cause.

The judgments of the Appellate and circuit courts are affirmed.

Judgment affirmed.

165	184
165	191

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY
v.
THE VILLAGE OF ELMHURST.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

SPECIAL TAXATION—*depot grounds may be specially taxed for street improvement.* Depot grounds of a railroad company adjacent to a street may be specially taxed to pay for improving such street. (*Chicago and Northwestern Railway Co. v. Village of Elmhurst*,—*ante*, p. 148,—followed.)

APPEAL from the County Court of DuPage county;
the Hon. C. A. BISHOP, Judge, presiding.

A. W. PULVER, (LLOYD W. BOWERS, of counsel,) for
appellant.

F. J. GRIFFIN, (N. G. MOORE, of counsel,) for appellee.

Per CURIAM: This is an appeal from an order of the county court overruling appellant's objections and confirming a special tax levied upon a part of appellant's depot grounds, and right of way connecting therewith, to pay for the cost of improving Bates street, in the village of Elmhurst, which runs parallel with and adjoining the land taxed. The questions involved in this case are the same as those disposed of in the case of *Chicago and Northwestern Railway Co. v. Village of Elmhurst*, (*ante*, p. 148.) That case governs this and is decisive of it. The only difference between the two cases is, that there the land assessed was right of way only, while here it is, in part, depot grounds, which, from the nature of their use, are benefited by the improvement of the street.

The judgment of the county court is affirmed.

Judgment affirmed.

WILLIAM EYLENFELDT

v.

THE ILLINOIS STEEL COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. PLEADING—*new cause of action barred by statute cannot be set up by way of amendment.* Where a cause of action distinct from that already averred in the original declaration is set up by way of amendment or of additional counts, after the time for suing thereon has expired, a plea of the Statute of Limitations will be sustained.

2. SAME—*original cause of action may be re-stated in additional counts after the statute has run.* A plea of the Statute of Limitations cannot be sustained to additional counts filed more than two years after the cause of action declared upon has accrued, where such counts merely re-state, in different form, the same cause of action averred in the original declaration filed in proper time.

3. SAME—*supplying omitted statement of cause of action by amendment is not a re-statement.* Where a declaration contains a formal commencement and conclusion, but omits to state the cause of action sued on, an amendment thereto which supplies the omission states a new cause of action, and is obnoxious to a plea of the Statute of Limitations if filed after the right to sue is barred.

Illinois Steel Co. v. Eylenfeldt, 62 Ill. App. 552, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This was an action of trespass on the case, brought by William Eylenfeldt, against the Illinois Steel Company, to recover damages for a personal injury received while in the employ of the steel company unloading certain cars, caused, as alleged, through the negligence of the steel company.

The accident resulting in the injury occurred January 17, 1892. Suit was begun on the 27th day of March, 1892, and on the 6th day of May of the same year plaintiff filed his declaration, which was as follows: "William Eylenfeldt, plaintiff, by L. H. Craig, his attorney, complains

165 185
60a 532
70a 47

165 185
170 187
173 268
173 305

165 185
73a 44
75a 131

165 185
79a 26
79a 50

165 185
80a 90

165 185
180 196

165 185
86a 286
88a 39

165 185
89a 322

165 185
d188 1804
92a 559
92a 576

165 185
191 95

165 185
198 505

165 185
110a 82
110a 84

165 185
e210 119
112a 307

165 185
114a 259

of the Illinois Steel Company, a corporation, defendant, of a plea of trespass on the case: For that, whereas, the defendant heretofore, to-wit, on the 20th day of February, A. D. 1892, was then and there the proprietor of, and was then and there operating, managing and controlling, by its agents and employees, a certain iron mill or foundry in the city of Chicago, in the county aforesaid, near to and in the neighborhood of the intersection of Ashland avenue and Thirty-first street, in the said city, and the plaintiff was then and there in the employ of the defendant in and about the management, control and operating of said iron mill or foundry, and was then and there placed by the defendant under the control and direction of its, the defendant's, foreman, wherefore the plaintiff says that he is damaged and injured and has sustained damages to the amount of \$25,000, and therefore he brings suit," etc. On May 13, 1892, the defendant interposed a general demurrer to the declaration, and on January 31, 1895, the court granted plaintiff leave to file an amended declaration. Plaintiff amended the declaration by inserting immediately after the word "foreman," facts which would make a good declaration in an action for negligence where an employee had been injured through the negligence of the employer. To the amended declaration the defendant pleaded the general issue and also a plea of the Statute of Limitations, in which it set up that the action did not accrue within two years next before the commencement of suit by filing the amendment to the declaration. To the plea the court sustained a general demurrer. The plaintiff also filed additional counts to the declaration, which were, in substance, like the amended declaration. To these defendant pleaded the Statute of Limitations, and the court sustained a demurrer to the plea. On a trial before a jury the plaintiff recovered a judgment, which, on appeal, was reversed in the Appellate Court on the sole ground that the action was barred by the Statute of Limitations. To reverse

that judgment the plaintiff in the action has prosecuted this appeal.

BRANDT & HOFFMANN, and L. H. CRAIG, for appellant.

WILLIAMS, HOLT & WHEELER, and E. PARMALEE PRENTICE, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

As will be observed, the plaintiff was injured on the 17th of January, 1892, and suit was brought on the 29th day of the following March. What purported to be a declaration was filed, but it stated no sufficient cause of action. No declaration was filed stating a cause of action until January 31, 1895,—more than three years after the accident and more than one year after the Statute of Limitations had run; and the question presented by the record is, whether the Statute of Limitations was a bar to the action when the amended declaration was filed, on the 31st day of January, 1895.

It is a well established rule of pleading that a new cause of action, distinct from that already averred in the declaration, cannot be set up by way of amendment to the declaration or by adding additional counts to the declaration after the time for suing upon such cause of action has expired by the Statute of Limitations. But when the amendment by an additional count is introduced merely to re-state in a different form the same cause of action set up in the declaration as originally drawn, and not to present a new and different cause of action, the rule does not apply, and a plea of the Statute of Limitations to such new count cannot be sustained. (*North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340.) The rule indicated is fully sustained by the case cited and also by the following cases: *Illinois Central Railroad Co. v. Cobb*, 64 Ill. 128; *Phelps v. Illinois Central Railroad Co.* 94 id. 548; *Mitchell v. Milholland*, 106 id. 175; *Dickson v. Chicago, Burlington and*

Quincy Railroad Co. 81 id. 215; *Blanchard v. Lake Shore and Michigan Southern Railway Co.* 126 id. 416; *Chicago, Burlington and Quincy Railroad Co. v. Jones*, 149 id. 361; *Haynie v. Chicago and Alton Railroad Co.* 9 Ill. App. 105.

In the *Phelps case*, *supra*, in the discussion of this question, it was among other things said (p. 557): "The causes of action declared on in the original declaration in the present case were for a failure to perform a common law duty by a common carrier,—to receive and carry goods offered for carriage. The causes of action stated in the additional counts are for failing to carry and safely deliver goods which defendant had received for carriage as a common carrier. The former were for refusing to enter upon the performance of the duty of a common carrier; the latter were for the failure to complete the performance of the duty of a common carrier, the performance of which had been entered upon. Under the circumstances of this case and our former decisions the difference is vital, there being no liability for refusing to receive and carry, but only for not carrying after having received the freight. The receipt is a necessary element of the cause of action. The original declaration negatived such receipt; the amended one averred it. We are disposed to agree with the view taken by the Appellate Court, that there were wholly different causes of action declared on in the original and amended counts of the declaration, and that, the evidence showing that the causes of action described in the additional counts accrued more than five years before those counts were filed, they were barred by the Statute of Limitations." The other cases cited lay down the same doctrine. Indeed, the result of all the cases we have examined on the question is the same. They hold that where an amendment of the declaration is a mere re-statement of the cause of action averred in the declaration it relates back to the beginning of the action, but where it sets up a new cause of action the Statute of Limitations is a good defense, if the amend-

ment to the declaration has been made after the statute has run.

The question then presented by the record before us is, whether the counts filed by the plaintiff in January, 1895, after the two years provided by the statute for bringing an action had expired, set up a new cause of action, or whether they were a mere re-statement of the cause of action already stated in the declaration. Upon an inspection of the declaration first filed by the plaintiff it will be found that the commencement of the declaration is in proper form in an action of trespass on the case, and no fault is found with the conclusion of the declaration, wherein damages are claimed; but when the body of the declaration is examined, where the cause of action should be set up, no cause of action whatever is averred in the declaration. The amended count does, however, set up a cause of action, but, inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action,—one which had never been stated before,—and hence the Statute of Limitations was a good defense. There could be no re-statement of a cause of action by the amended declaration unless the cause of action had been stated before. If the plaintiff had stated his cause of action in a defective manner, omitting some feature which should have been incorporated in it, then an amendment re-stating the cause of action would not fall within the statute. But such was not this case.

The *Phelps case*, *supra*, from which we have quoted, is much like the case under consideration. There the original declaration set up that the railroad company was liable because it refused to receive and carry goods offered for carriage. The refusal to receive and carry was set up as the cause of action. In the amended counts, filed after the statute had run, the cause of action averred and relied upon was a failure to carry and deliver goods which the railroad company had received for carriage as

a common carrier. It was held, as the railroad company was under the military control of the government, it was not in the free and unrestrained exercise of its franchise as a common carrier, and hence not bound to receive freight for shipment, and being under no obligation to receive goods for shipment the original declaration failed to state a cause of action; but the amended declaration, which did set up a cause of action, stated a cause of action wholly different from the original declaration, and hence fell within the Statute of Limitations.

It is, however, suggested in the argument, that the issuing of a summons arrests the running of the Statute of Limitations, and the filing of the amended declaration related back to the commencement of the suit, and reference is made to *Schrøder v. Merchants and Mechanics' Ins. Co.* 104 Ill. 71. It may be conceded that the issuing of a summons in an action at law is the commencement of a suit, and ordinarily the issuing of the summons will arrest the running of the statute, and a declaration filed will relate back to the date of the summons. But that doctrine has no bearing on the facts of this case. Here the suit was commenced by the issuing of a summons before the statute had run. A declaration was filed before the statute had run, but the amended declaration, which set up the cause of action upon which issue was joined and a trial had, was not filed until the Statute of Limitations had run, and all the cases agree that if the cause of action set up by the amendment is a new one, and not a mere re-statement of the cause of action set out in the original declaration, the amended declaration will not relate back to the commencement of the suit. If the amended declaration had been the first and only declaration filed in the cause, we are not prepared to say it would not relate back to the commencement of the suit and thus prevent the running of the statute. But such was not the case. As has been seen, a declaration was filed soon after the suit was commenced. True, it did

not set out a sufficient cause of action, but it was nevertheless a declaration, and so treated and so regarded by the parties and the court where the cause was pending.

We regard the judgment of the Appellate Court correct, and it will be affirmed.

Judgment affirmed.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY
v.

THE VILLAGE OF ELMHURST.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

This case is governed by the decision in the case of *Chicago and Northwestern Railway Co. v. Village of Elmhurst*, (*ante*, p. 148,) the questions involved being the same.

APPEAL from County Court of DuPage county; the Hon. C. A. BISHOP, Judge, presiding.

A. W. PULVER, (LLOYD W. BOWERS, of counsel,) for appellant.

F. J. GRIFFIN, (N. G. MOORE, of counsel,) for appellee.

Per CURIAM: This is an appeal from an order of the county court overruling appellant's objections and confirming a special tax levied upon a part of appellant's depot grounds, and adjoining right of way, to pay for the cost of improving Bates street, in the village of Elmhurst, which runs parallel with and adjoining the property taxed. The questions involved are the same as those disposed of in the two cases of the same title heretofore reported, (*ante*, pp. 148 and 184.) Those cases control this case and are decisive of it.

The judgment of the county court is affirmed.

Judgment affirmed.

HENRY B. STONE *et al.*

v.

MILO G. KELLOGG.

Filed at Ottawa November 9, 1896—Rehearing denied March 3, 1897.

1. CORPORATIONS—*right of stockholder to examine books of corporation—when enforced by mandamus at common law.* A stockholder, to enforce his right to examine the books and records of a corporation by *mandamus*, was, at common law, required to show some specific interest at stake which rendered the examination necessary or beneficial.

2. SAME—*statute concerning stockholder's right of examination enacted in view of the common law restrictions.* The statute concerning a stockholder's right to inspect records and books of account of a corporation (Rev. Stat. 1874, chap. 32, sec. 13,) was enacted in view of the common law restrictions on such right, its purpose being to protect the minority stockholders against the power of the majority and against mismanagement by faithless officers.

3. SAME—*stockholder's right to examine books and records is absolute.* Aside from the express limitation that the right of a stockholder to examine a corporation's records and books of account shall be exercised at reasonable times, and the implied limitation that it shall not be exercised from idle curiosity or for unlawful purposes, the right is absolute.

4. SAME—*the custodian of the records cannot question stockholder's motive for examination.* The custodian of the books and records of a corporation cannot question a stockholder's motive for an examination thereof, and if he refuses an inspection for alleged improper motives he holds the burden of proof, upon petition by a stockholder for *mandamus*.

5. SAME—*right of stockholder extends to examination of all records and papers.* The right of a stockholder to examine the records and books of account of a corporation extends to all papers, contracts, minute books or other instruments from which he can derive any information which will enable him to better protect his interests and perform his duties.

6. PLEADING—*when answer to petition for mandamus by stockholder is insufficient.* An allegation in an answer to a stockholder's petition for *mandamus* to compel officers of a corporation to permit him to examine its books and papers, that the stockholder has not been denied the right to examine any record or book to which he was lawfully entitled, is argumentative, and obnoxious to demurrer.

Stone v. Kellogg, 62 Ill. App. 444, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Appellee filed his petition in the circuit court of Cook county for a writ of *mandamus* to compel the appellants, respectively the president and secretary of the Central Union Telephone Company, an Illinois corporation, to permit him to examine the records, books of account and papers of the company. Appellee owns 761 shares, of the par value of \$100 each, of the capital stock of the company, and is, and has been from its first organization, one of its directors.

The petition alleged, among other things not necessary to be set out here, that for several years prior to June 22, 1894, the petitioner, owing to poor health, absence from the country and other engagements, had not given the affairs of the company such careful attention as his personal and official interests demanded, and having heard rumors that the agents and officers of the company immediately intrusted with the management of its affairs were not administering their trusts for the interests of the shareholders, he, on the 22d day of June, 1894, as such director and stockholder, and with proper motives, applied to the defendant Wilson S. Chapman, the secretary of said company, to see the minute book of the board of directors, which said secretary permitted him to do; that after examining said minute book the petitioner asked to see the minute book of the executive committee, (the business of the company, under its by-laws, being almost wholly managed by its president and executive board appointed by the board of directors,) but Chapman informed the petitioner he could not see such minute book without the permission of the president of the company, Stone, and also informed the petitioner that he thought he ought not to see such record,

because the petitioner had filed a request with the department of justice of the United States that the government should institute suit to repeal the Berliner patent, in which the Central Union Telephone Company was interested, as a licensee of the American Bell Telephone Company; that on or about May 25 the petitioner again called on Chapman and renewed his request to see such minute book of the executive committee, but Chapman told the petitioner that Stone, the president of the company, had directed him to refuse the petitioner the privilege of seeing such minute book; that the petitioner then asked to see the contracts between the American Bell Telephone Company and the Central Union Telephone Company; that Chapman refused to permit him to do so, but referred the petitioner to Stone, the president of the company; that the petitioner and Stone had a conference about four or five o'clock of the same day, May 25, and Stone refused to allow the petitioner the right to see such minute book and contracts, giving as his reason that the petitioner had caused the institution of the suit by the United States government to annul the Berliner patent, and a suit against the Western Electric Company, and a suit against the American Bell Telephone Company and the Great Southern Telephone and Telegraph Company; that after some more attempts to meet Stone, the petitioner and he had another conference on the 14th of June, 1894, when Stone again denied the request of the petitioner, and told him to present the matter to the board of directors, which petitioner refused to do; that petitioner then made a formal demand, in writing, on the president of the company, Stone, on the 18th day of June, 1894, to be permitted to examine the records and books of the company, both collectively and each separately, specified in such demand; that to this demand Stone replied by letter of June 20 acknowledging the receipt of the said demand, but again denying the request until petitioner should apply to the board of

directors and have them pass on the matter; that to this letter petitioner replied renewing his demand as director and stockholder, and declining to apply to the board of directors; that on the 21st of June, 1894, petitioner addressed to the secretary, Chapman, a letter informing him that he should present himself at the company's office on June 25, 1895, for the purpose of examining the records and books, in accordance with the letter he had addressed to Stone, and on the 25th, in pursuance of said letter, petitioner presented himself at the office of the company for such examination, but was refused permission to make it.

The petition then proceeds as follows: "Your petitioner has been informed and believes that when, nearly twelve years ago, the American Bell Telephone Company obtained the control of the majority of the stock of the Central Union Telephone Company, or its predecessors, there was a writing entered into or an agreement made and reduced to writing, and assented to by the American Bell Telephone Company, which regulated the relations between the companies and was intended to conserve and protect the interests of the minority stockholders, in view of the fact that the American Bell Telephone Company was to have the ownership of the majority of the stock of the Central Union Telephone Company, and would have interests in the management of the Central Union Telephone Company adverse to the interests of the other stockholders, and your petitioner believes that the present management of the Central Union Telephone Company is in important particulars contrary to the express terms of said writing or agreement, and your petitioner believes that said writing or agreement is among the records and the papers of the Central Union Telephone Company controlled by said Stone and Chapman. Your petitioner desires to obtain access to this writing or agreement relating to the working arrangement of the companies, as well as all other books and records contemplated in his said letter of June 18, marked 'Ex-

hibit C.' And the complainant further gives the court to understand and be informed, that he has reason to fear and believe, and does fear and believe, that by reason of the relations of the American Bell Telephone Company and its control thereof, by reason of its ownership of a majority of the stock thereof, and the further facts as to the large salary paid to defendant Stone, and also that defendant Stone is related by marriage to the Forbeses, who are among the largest owners of the stock of the American Bell Telephone Company, the affairs of the Central Union Telephone Company have not been and are not now carefully and economically administered, but that contracts and business arrangements have been made and are now in force with the American Bell Telephone Company which have been entered into with a reckless disregard of the interests and rights of such minority holders, and with a desire rather to serve the interests of the American Bell Telephone Company than of the Central Union Telephone Company; that while complainant does not and has not contemplated any litigation against the Central Union Telephone Company, if he could have these evils corrected, or if he could first induce the stockholders and board of directors of said company to correct the same, he has intended, by all lawful means within his power, to induce the said company to so conduct its affairs as shall best subserve the interests of the stockholders, and not dispose of large portions of its revenue to the American Bell Telephone Company in payment of royalties on articles no longer covered by patents, or as rentals for articles which could be purchased outright at much less than the amount paid as rent per annum, or conduct the business in other ways contrary to the interests of the Central Union Telephone Company; that it has been, is now and will be his course of conduct to pursue his course with a view to secure the honest and economical administration of the affairs of this company, and that he has

no other purpose in view, and has no desire to publish the result of his investigation to the courts or to the public in any way, and is willing to submit to any reasonable restrictions, consistent with the due and adequate protection of his own interests, which the court may think it has power to impose, and to give any reasonable security to abide by such restriction, reserving to himself only the right, in the event that it becomes necessary in his judgment so to do, to seek such relief as he may be advised the law affords to protect his interest in said company, which embraces a large portion of his fortune. By means whereof the petitioner is prevented from examining the books of account and records of said Central Union Telephone Company as he is by law entitled to do, and of which the said defendants have the sole custody and control, wherefore the petitioner prays a writ of *mandamus*, directed to said Henry B. Stone and William S. Chapman, president and secretary, respectively, of the Central Union Telephone Company, commanding them, and each of them, forthwith to admit the complainant to the office of the said Central Union Telephone Company, and to give to him full access to all books of account and records of the said company, including herein the records of the executive committee of the board of directors thereof, and of all the contracts entered into by said company with the American Bell Telephone Company, or by either of said companies, through any agent, officer or servant thereof with the other, and that such admittance and access be permitted from day to day during business hours, and in such a manner as not to interrupt the order of business of the corporation, to the complainant, until the same shall have been completed, and that such further order may be made in the premises as justice may require," etc.

The petitioner's letters mentioned in the petition, and the replies thereto, were attached as exhibits, and contained a more minute specification of the records, books

and papers he demanded permission to examine, and his reasons therefor.

The principal answer, that of appellant Stone, filed to the petition, among other things states: "This defendant further and expressly denies that either this defendant or any other officer of said company has at any time refused to the petitioner the right to examine any of the records or accounts of said company which the petitioner was lawfully entitled to examine, either as a stockholder or director of said company; and he avers that according to his best information and belief the said petitioner is, and at all times has been, fully acquainted with all the facts which by his petition he represents himself as desiring to ascertain, and that the real purpose of his application for books, papers, records and accounts is not, and never has been, the ascertaining of any facts which the petitioner was legitimately entitled to know, but that such purpose is, and always has been, to discover some possible ground of attack upon said company and its management, contrary to the interests of said company and for the private advantage of the petitioner." The answer then relates the history of the organization of the company and of its management; alleges that petitioner has neglected his duties as director, failed to attend the meetings of the board, and had never made known his grievances at any meeting of the directors; that the president and executive committee are subject to the direction of the board, and will, on its direction, furnish any information desired; that as director petitioner should exercise his rights through the board, and as an individual he has no greater rights than any other stockholder, and that he has never sought any investigation at any meeting of the board, but that defendant had offered to petitioner to call a meeting of the directors for the consideration of petitioner's grievances, which offer petitioner declined; that petitioner, as a stockholder, does not seek the examination of the records, books and papers in good faith,

but in furtherance of his own interests outside and in hostility to the company; that it was necessary to the business success of the company to enter into agreements with the Bell Telephone Company, whereby the perpetual and exclusive right and license to use its patents were secured, among the most important of which was the Berliner patent, which petitioner had instigated a suit to overthrow, and which, so long as it is in force, prevents the destruction, to a large extent, of the company's business by rival companies; that within two or three years past petitioner has claimed ownership of patents for valuable improvements in the multiple switch-board, a useful appliance to the company, and in which the Bell company has a large interest, and that should he succeed in establishing his ownership therein he would destroy the protection the company now enjoys in its use, and be in a position to exact large tribute from the company and all other telephone companies, and which interest, if secured by him, would far outweigh his interest as a stockholder in the Central Union company; that "the attack upon the Berliner patent, and the subsequent attack upon the telephone companies supposed to be controlled by the Bell company, of which the present attack is one, were made in pursuance of threats on behalf of said Kellogg that the Berliner patents would be attacked unless the claims of said Kellogg to the multiple switch-board patent should be recognized and conceded, or unless settlement of his said claims in that behalf should be made at a very large amount; and this defendant charges the fact to be, that neither this suit nor the investigation which said Kellogg professes a desire to make is for the genuine purpose of subserving the interest of the Central Union company or its stockholders, but for the advancement of private and selfish interests of said Kellogg, and that the action of said Kellogg in that behalf is in violation of his duties as a director and in hostility to the just rights and interests of the Central Union company;

that the institution of legal proceedings, at the instance of said Kellogg, to annul and cancel the Berliner patent is a source of great encouragement to all competing companies and an injury to the Central Union company, and would result, should said suit prove successful, in great damage to the Central Union company. He further shows that throughout said entire scheme the said Kellogg has acted secretly, without conference or consultation with any of his fellow-directors in the Central Union company and without informing them of his intentions or purposes. Defendant further says that the broad demands of said Kellogg for an opportunity, by himself and such others as he may allege to be his agents, to make transcripts of contracts, correspondence and other papers covering pending negotiations and all other matters of the Central Union company, and his refusal of the written offer of this defendant as contained in 'Exhibit D' to the petition herein, are in furtherance of the schemes of said Kellogg and for purposes hostile to the rights of the Central Union company, and are in excess and an abuse of his rights as a member or officer of said company in any capacity.

* * * But this defendant is advised, and therefore states, that neither by the common law nor by the statute of Illinois has a stockholder the right, even when acting from proper motives and desiring information for a lawful and proper purpose, to inspect and examine all papers, contracts, correspondence and documents belonging to the company, or to be informed, either by inspection or otherwise, of the exact situation of contracts and business affairs in which said company is concerned; that in the nature of the case many matters of corporate business are from time to time under negotiation and in delicate stages of advancement, where publicity would damage, and in many instances defeat, the entire negotiation, and that such is the fact with many of the affairs of the Central Union company, and particularly in its relations with the Bell company and the American Telegraph and Tele-

phone Company respecting royalties to be paid by the Central Union company, and the extent of its territorial rights; that the particular subjects referred to by said Kellogg in this petition, and the exhibits thereto, are now, and were at the time of the institution of this suit, in process of negotiation, and that until the questions now pending in reference to the Berliner patent are judicially determined, it seems unwise, and might be impossible, to make final agreements or arrangements, but that temporary arrangements were necessary and have been made, and are now existing, which are terminable upon short notice by either party; that final arrangements or agreements can only be concluded by the company through action of its board of directors; that the records of the company consist of the records of the action taken by the board of directors, and these have been freely exhibited to said Kellogg, as is shown by the allegations of his petition; that the books of account of the company are open to inspection of said Kellogg at all convenient times, and access to them has never been refused him."

The court sustained petitioner's demurrer to defendants' answers. They elected to stand by their answers, whereupon final judgment was given to petitioner for a writ of *mandamus* against the defendants, as president and secretary of the company, "commanding them, and each of them, forthwith to admit the complainant to the office of the said Central Union Telephone Company, and to give him full access to all books of account and records of said company, including herein the records of the executive committee of the board of directors thereof, and to all the contracts entered into by the said company with the American Bell Telephone Company, or by either of said companies, through any agent, officer or servant thereof with the other, and that such admittance and access be permitted from day to day during business hours, and in such a manner as not to interrupt the business of the corporation, to the complainant, until the same

shall have been completed." Judgment was also for costs against defendants. This judgment was affirmed on appeal to the Appellate Court, and the appellants now seek its reversal by further appeal to this court.

WILLIAMS, HOLT & WHEELER, for appellants:

At common law the right to inspection by a shareholder is not absolute, but is qualified by considerations of motive, purpose or circumstances. *Lyon v. Screw Co.* 17 Atl. Rep. 61.

Inspection may be refused when there is reason to apprehend an improper use of the privilege by making unauthorized entries. *Rosenfeld v. Einstein*, 46 N. J. L. 479.

The right should be used with great care, and the reasons for its exercise must be clear and cogent. *People v. Railway Co.* 11 Hun, 1.

Our statute gives the right to inspect "records and books of account."

A statute giving power to require books to be brought into the State does not cover papers and memoranda. *Huyilar v. Cattle Co.* 42 N. J. Eq. 139.

"Books of account" covers books showing current commercial transactions. *Lyon v. Screw Co.* 17 Atl. Rep. 61.

Under a statute giving the right to inspect books an application for all records and papers is too broad. *People v. Walker*, 9 Mich. 328.

Where the application is too broad it should be refused altogether. *Rosenfeld v. Einstein*, 46 N. J. L. 479; *Regina v. Trustees*, 5 B. & A. 978.

CHARLES H. ALDRICH, for appellee:

The stockholders of a corporation had, at common law, a right to examine, at any reasonable time, any one or all of the books and records of the corporation. *Iron Co. v. Commonwealth*, 105 Pa. St. 111; *Huyilar v. Cattle Co.* 40 N. J. Eq. 392; 1 Cook on Stock, etc. sec. 511; *Lewis v. Brainerd*, 53 Vt. 519.

Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at reasonable times. The law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all stockholders. Grant on Corp. 311; 2 Phillips on Evidence, 313; Redfield on Railways, 227; Angell & Ames on Corp. sec. 681; *Martin v. Oil Works*, 28 La. Ann. 204; *Iron Co. v. Commonwealth*, 105 Pa. St. 111; 113 id. 563.

Corporators have always, on showing a good reason, though not for curiosity's sake, a right of access to and inspection of all the books, muniments and papers belonging to the corporation, and if this general right be denied or obstructed, a *mandamus* to inspect may be had on proof of the refusal of the right to and reason for the inspection. Grant on Corp. 311; High on Ex. Legal Rem. sec. 308; Angell & Ames on Corp. sec. 707.

Mr. JUSTICE CARTER delivered the opinion of the court:

The question whether or not appellee is entitled to a writ of *mandamus* to compel appellants, as officers of the Central Union Telephone Company, to permit him to examine the records, books and papers of the corporation, is presented by demurrer to appellants' answer to the petition. Appellee is both a stockholder and a director in the company. As a stockholder, owning more than \$75,000, at its face value, of the capital stock, he had large interests to protect, and as a director he had important duties to perform. In both capacities he had the undoubted right to inform himself (and, if necessary, by examination of the records, books and papers of the company at reasonable and proper times,) as to the affairs and condition of the company, for the better protection of his own interests and the performance of his duties. The petition was amply sufficient, and unless it can be said that the answer showed sufficient reason for refusing

the writ, the judgments of the courts below granting it must be affirmed.

At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation. 1 Cook on Stock and Stockholders, sec. 511; *A. & F. R. R. Co. v. Rowley*, 9 Fla. 508; *Queen v. Maraguita Mining Co.* 1 El. & El. 289; *King v. Taylor Co.* 2 Barn. & Ad. 115; *In re Burton and the Saddlers' Co.* 31 L. J. Q. B. 62; *King v. Wilts and B. Canal Nav. Co.* 3 Ad. & El. 477; *King v. Clear*, 4 B. & C. 899; *Queen v. Grand Canal*, 1 Irish L. R. 337; *Birm Bristol Co. v. White*, 12 B. 282; *Mutter v. Eastern and Mid. Railway Co.* 38 Ch. Div. 92; 105 Pa. St. 111; 113 id. 563; Angell & Ames on Corp. sec. 681; Redfield on Railways, 227; Grant on Corp. 311; 2 Phillips on Evidence, 313; *Martin v. Bienville Oil Works*, 28 La. Ann. 204; *Foster v. White*, 86 Ala. 467; *Winter v. Baldwin*, 89 id. 483; *State v. L., S. & F. R. R. Co.* 29 Mo. App. 301; *State v. Berghenthal*, 72 Wis. 314; *State v. Sportsman's Park Ass.* 29 Mo. 326. But the writ of *mandamus* would not issue as a matter of course, to enforce a mere naked right or to gratify mere idle curiosity, but it was necessary for the petitioner to "show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired." (High on Ex. Legal Rem. sec. 310; 2 Spelling on Ex. Relief, sec. 1612.) But owing to the great increase in the number of stock corporations and the volume of business transacted by them, this right of inspection of the corporate books by the individual stockholder became so important that many of the States of the Union have made specific provision by statute for its enforcement. Section 13 of chapter 32 of the Revised Statutes of this State is as follows: "It shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this State, correct books of account of all its business, and every stockholder in such corporation shall have the right, at all reasonable times, by himself or by his attor-

ney, to examine the records and books of account of the corporation."

In *Foster v. White*, 86 Ala. 467, it was held that a similar provision of the statutes of Alabama was not merely declaratory of the common law, but that "the statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right, and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish and maintain their rights and to intelligently perform their corporate duties. * * * The only express limitation is, that the right shall be exercised at reasonable and proper times. The implied limitation is, that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed." See, also, *Huy-lar v. Cragin Cattle Co.* 40 N. J. Eq. 392; *Swift v. State*, 6 Atl. Rep. (Del.) 856.

This interpretation of the statute of Alabama made by the Supreme Court of that State is, we think, a correct one, and is as liberal to the officers and agents of the corporation having the custody of its books, or to the majority of the stockholders or directors under whose orders they may act, as would be permissible to give to our own statute. Measured by the rule of law thus declared, appellants' answer was clearly insufficient. The statement therein that appellee had not been refused permission to examine any of the records and accounts which he was lawfully entitled to examine either as a stockholder or director, is a mere argumentative denial of the allegations contained in the petition and is obnoxious to the demurrer as interposed. It cannot be tolerated that a stockholder can be denied the exercise of so valuable a right given to him in express terms by the statute, by those who are the mere agents of the stockholders, upon the plea as in effect set up in the answer in this case, that the petitioner had not been denied any information to be derived from an examination of the books and papers which he was legitimately entitled to know. As a director and stockholder he was legitimately entitled to know anything and everything of which the records, books and papers of the company would inform him, so far as anything in the answer shows to the contrary. *People v. Throop*, 12 Wend. 185.

There was no sufficient allegation in the answer from which it can be made to appear, upon the admission made by the demurrer, that the object and purpose of the petitioner were not legitimate or were to injure the corporation. It is no sufficient answer to such a petition to impugn the motives of the petitioner. In his petition he states: "That it has been, is now and will be his course of conduct to pursue his course with a view to secure the honest and economical administration of the affairs of this company, and that he has no other purpose in view, and has no desire to publish the result of his investiga-

tion to the courts or to the public in any way, and is willing to submit to any reasonable restrictions, consistent with the due and adequate protection of his own interests, which the court may think it has power to impose, and to give any reasonable security to abide by such restriction, reserving to himself only the right, in the event that it becomes necessary in his judgment so to do, to seek such relief as he may be advised the law affords to protect his interest in said company, which embraces a large portion of his fortune." We agree with the Appellate Court that the courts are not without power to prevent an abuse of the rights which the petitioner enjoys by virtue of his relation to the company. 4 Thompson's Com. on Law of Corp. secs. 4406-4425.

The objection that the right to examine the records and books of the company does not embrace the right to examine the contracts and other papers mentioned in the pleadings we regard as without force.

Finding no error the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

v.

THE CITY OF OTTAWA.

Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.

1. APPEALS AND ERRORS—where no question of law is presented for review. Where, in cases tried before the court without a jury, no exceptions are taken to rulings on evidence and no written propositions of law are submitted by either party, no question of law is preserved for the Supreme Court to review.

2. SAME—that the evidence does not entitle plaintiff to recover is a question of fact. Whether the evidence in the case entitles the plaintiff to recover is a question of fact, which, in a suit at law, is conclusively settled by the finding of the Appellate Court.

165	207
166	442
165	207
171	204
172	135
165	207
182	248
165	207
194	" 74
195	" 432
165	207
201	" 417
165	207
211	" 401
211	" 402

3. *SAME*—*questions of law are preserved by submitting written propositions.* Where a jury is waived and trial had before the court, either party may, under the statute, (Rev. Stat. 1874, chap. 110, sec. 41,) submit written propositions of law to the court for a ruling upon any legal matter bearing upon the rights of the parties, thus preserving the questions of law for a court of review.

C., B. & Q. R. R. Co. v. City of Ottawa, 65 Ill. App. 631, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. DORRANCE DIBELL, Judge, presiding.

SAMUEL RICHOLSON, (O. F. PRICE, of counsel,) for appellant.

ROBERT CARR, City Attorney, and A. E. WHEELER, for appellee.

Per CURIAM: This was an action brought originally before a justice of the peace by the city of Ottawa, against the Chicago, Burlington and Quincy Railroad Company, to recover a certain sum of money for an alleged violation of a city ordinance. The plaintiff recovered before the justice of the peace and the defendant appealed to the circuit court, where a jury was waived and a trial had before the court, which resulted in a judgment in favor of the plaintiff for \$100. On appeal to the Appellate Court the judgment was affirmed, to reverse which the railroad company appealed to this court, having obtained from the Appellate Court a certificate of importance.

On the trial in the circuit court no question was raised in regard to the admission or exclusion of evidence, and no written propositions were submitted to the court to be held as law. Under such a state of facts the inquiry arises, what, if any, errors of law are presented by the record for our consideration?

It will be observed that a jury was waived by agreement, and where that has been done, in order that a suitor

may protect himself against any erroneous view the judge may entertain in regard to the law which should govern the case, our statute provides: "In all cases in any court of record of this State, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." (Rev. Stat. 1874, chap. 114, sec. 40.) Under this statute the attorney of either party had the right to obtain, by written propositions, the ruling of the court on the validity or effect of any ordinance or any other evidence which had been introduced, or in regard to any other legal matter bearing upon the rights of the parties; and if the court had, in the propositions submitted, made an erroneous ruling, the party against whom it was made would have been in a position, on appeal, to take advantage of such errors as the court may have committed. But as this course was not pursued there is no question of law presented by the record for our consideration. *Fitch v. Johnson*, 104 Ill. 111.

The only question attempted to be raised here is, that under the evidence the plaintiff was not entitled to recover. That was a question of fact, upon which, under the statute, the judgment of the Appellate Court is final.

As no questions of law are presented for our consideration, the judgment of the Appellate Court will have to be affirmed. *Wrought Iron Bridge Co. v. Highway Comrs.* 101 Ill. 518; *Edgerton v. Weaver*, 105 id. 43; *Farwell v. Shove*, id. 61; *Hardy v. Rapp*, 112 id. 359; *Barber v. Hawley*, 116 id. 91; *Michigan Life Ins. Co. v. Hall*, 160 id. 488.

Judgment affirmed.

MR. JUSTICE CARTWRIGHT took no part.

JENNIE B. WILLIAMS, Admx.

v.

EMMA J. CHAMBERLAIN *et al.**Filed at Ottawa November 9, 1896—Rehearing denied March 4, 1897.*

1. GIFTS—*delivery of subject of gift is necessary to its validity.* It is essential to the validity of all gifts, whether *inter vivos* or *causa mortis*, that there be a delivery of the subject of the gift or acts equivalent thereto.

2. SAME—*gifts of a testamentary character must comply with Statute of Wills.* Though the intention of a party to make a gift is clear, yet in the absence of actual delivery his acts, to be equivalent thereto, if of a testamentary character, must be in compliance with the Statute of Wills.

3. SAME—*proof of intention, however positive, cannot change title to property.* If, from mistake of law, a party intending to make a gift fails to do those things which the law requires to carry his intention into effect, mere proof of his intention, however positive, cannot change the title to the property.

4. SAME—*courts cannot complete an imperfect gift when the subject has vested in another.* A gift *inter vivos*, incomplete at the death of the donor, the subject of which has vested in his legal representatives, cannot be completed by the courts.

5. SAME—*acts ineffectual to make a valid gift of insurance policy.* A gift of a life insurance policy, payable to the donor's legal representatives, is incomplete where the donor merely attaches to the policy a witnessed assignment thereof to the donee, but retains the policy and assignment himself and gives no notice of the assignment to the company. (*Otis v. Beckwith*, 49 Ill. 121, distinguished.)

6. SAME—*incomplete gift of insurance policy is not valid though donor followed the advice of company's agent.* Where acts done by the insured are ineffectual to make a valid gift of his policy by assignment, because he failed to deliver the same or notify the insurance company of the assignment, the fact that he followed the advice and directions of the company's agent, who assured him of the correctness of the course taken, does not operate to validate the gift.

Chamberlain v. Williams, 82 Ill. App. 423, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

PECK, MILLER & STARR, for appellant:

Delivery is essential to a gift. *Telford v. Patton*, 144 Ill. 611; *Barnum v. Reed*, 136 id. 388; *Bovee v. Hinde*, 135 id. 137; *Richardson v. Richardson*, 148 id. 563; *Byars v. Spencer*, 101 id. 429; *Hoig v. Adrian College*, 83 id. 267; *Baskett v. Hassell*, 107 U. S. 602; 108 id. 267; *Trough's Appeal*, 75 Pa. St. 115; *Palmer v. Merrill*, 6 Cush. 282; *Foster v. Gile*, 50 Wis. 603; *Bank v. Copeland*, 77 Me. 263; *Flanders v. Blandy*, 45 Ohio St. 108; *May on Insurance*, (3d ed.) sec. 390; 2 Kent's Com. 438, 439; *Young v. Young*, 80 N. Y. 422; *Trimmer v. Danby*, 25 L. J. Ch. 424; 8 Am. & Eng. Ency. of Law, 1316.

To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee irrevocably. *Barnum v. Reed*, 136 Ill. 398.

Out of an imperfect gift no trust will be created. *Clarke v. Lott*, 11 Ill. 105; *Badgley v. Votrain*, 68 id. 25; *Wadhams v. Gay*, 73 id. 415; *Barnum v. Reed*, 136 id. 388; *Milroy v. Lord*, 4 DeG., F. & J. 264; *Richardson v. Delbridge*, L. R. 18 Eq. 11; *Hayes v. Insurance Co.* L. R. 8 Irish, 139; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Antrobus v. Smith*, 22 Ves. Jr. 39; *Jones v. Lock*, L. R. 1 Ch. App. 25; *Moore v. Moore*, 43 L. J. Ch. App. 623; *In re Breton's Estate*, L. R. 17 Ch. 416; *Young v. Young*, 80 N. Y. 422.

JOHN M. GARTSIDE, and FRANK P. LEFFINGWELL, for appellees:

No one but the insurer can raise the question that the insured had in his lifetime assigned his life insurance policy to one who had not an insurable interest. *Martin v. Stubbings*, 126 Ill. 387; *Benefit Ass. v. Blue*, 120 id. 125; *Crawford's Appeal*, 11 P. F. Smith, 53; *Insurance Co. v. Flack*, 3 Md. 341; *Insurance Co. v. France*, 94 U. S. 501.

Any one may insure his own life and assign the policy to whom he will, if the transaction is not a mere cover for a wager. *Martin v. Stubbings*, 126 Ill. 387; *Insurance Co. v. Schaefer*, 94 U. S. 457; *Langdon v. Insurance Co.* 14 Fed. Rep. 272.

There was a delivery to the donees. Acceptance by the donees completed the delivery. Their acquiescence was acceptance. *Otis v. Beckwith*, 49 Ill. 121; *Walker v. Walker*, 42 id. 311; *Masterson v. Cheek*, 23 id. 73; *Knapstein v. Tennette*, 57 Ill. App. 570; *McElroy v. Hiner*, 133 Ill. 159; *Bryan v. Wash*, 2 Gilm. 569; 2 Kent's Com. 438, (13th ed.) note b; 2 Rolle's Abr. 62; 14 Viner's Abr. 123.

Manual delivery was not necessary. The intention governs. *Otis v. Beckwith*, 49 Ill. 121; *Walker v. Walker*, 42 id. 311; *Bryan v. Wash*, 2 Gilm. 569; *Reed v. Douthit*, 62 Ill. 349; *Masterson v. Cheek*, 23 id. 73; *Weber v. Christen*, 121 id. 96; *Knapstein v. Tennette*, 57 Ill. App. 570; *McElroy v. Hiner*, 133 Ill. 159; *Miller v. Meers*, 155 id. 284; *Chowne v. Baylis*, 31 Beav. 351; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Ellis v. Secor*, 31 Mich. 185; *Reybald v. Reybald*, 8 Harr. (Pa.) 308; *Crawford's Appeal*, 11 P. F. Smith, 53; *Hine & Nichols on Life Policies*, 33-36.

Delivery to the donees was not necessary. The gift was made under seal. *Otis v. Beckwith*, 49 Ill. 121; 2 Kent's Com. 438, (13th ed.) note b; Comyns' Digest, title "Biens."

Mr. JUSTICE CARTER delivered the opinion of the court:

This case arose in the probate court of Cook county upon the separate petitions of appellants, filed in that court and consolidated and tried together, for the delivery to the petitioners, respectively, of two policies of insurance upon the life of Frank H. Williams, deceased,—one for \$10,000 claimed by petitioner Emma J. Chamberlain, and the other for \$5000 claimed by petitioner Maria W. Sheppard. The petitioners were sisters of the deceased, and they claimed the policies as gifts from their brother. Williams died intestate on November 23, 1891, leaving Jennie B. Williams his widow, (who was appointed administratrix of his estate,) and Marion Ethel, a little girl, his only child. The policies bore date, respectively, March 1 and March 13, 1884, and were payable to his legal representatives. They were found after

his death in a tin box kept by him in the vault at the wholesale house of Marshall Field & Co., where he was employed. Attached to the \$10,000 policy was the following assignment:

"In consideration of two dollars to me paid, I do hereby assign, transfer and set over unto Emma J. Chamberlain, (my sister,) of Croton Falls, New York, her executors, administrators and assigns, policy number 170,501 in the Connecticut Mutual Life Insurance Company, dated the first day of March, A. D. 1884, in the sum of \$10,000, together with any and all profits due or to become due thereon.

"Witness my hand and seal at Chicago, Illinois, this fifth day of March, A. D. 1884.

FRANK H. WILLIAMS. [L. S.]

"In presence of Henry M. Curtis.

(See special notice endorsed hereon.)"

A similar assignment to Mrs. Sheppard was attached to the other policy. The "special notice" mentioned as endorsed on the assignment was as follows:

"The company offers this form of assignment of policies solely for the convenience and accommodation of its members. It has no control of assignments, cannot become responsible for them, and must reserve all question for impartial action when contracts become due and payable. All claims under assignments are subject to satisfactory proof of the assignee's interest in the life insured, and to all defenses against the obligations of the policies. It is desirable that the transfer be annexed or attached to the policy. Duplicates or certified copies of assignments may be sent to the company to be noted and filed for the purpose of reference and information.

JOHN M. TAYLOR, *Vice-President.*"

The sixth paragraph of the conditions of the policies provides: "That no assignment of this policy shall be valid unless made in writing, endorsed thereon; and any claim against this company arising under this policy, made by any assignee, shall be subject to satisfactory proof of interest in the life insurance, in due form, and to any breach of the conditions of this contract by any of the parties thereto, whether such breach exists prior or subsequent to such assignment; and such proof of interest

shall be a condition precedent to any right of action on this contract by or on behalf of such assignee, and this company shall in no case be responsible for the validity of any assignment."

No question appears to have been made by the company as to its liability to pay, and by agreement of the parties and order of the probate court the policies were delivered to the American Trust and Savings Bank for collection, and for said bank to hold the proceeds thereof in trust for the parties who should be found entitled.

From the evidence it appeared that Curtis, who witnessed the assignment, was an agent of the insurance company, and when Williams received the \$10,000 policy he asked Curtis how he could make it payable to a particular person; "that Curtis told Williams it could be done by an assignment, and handed Williams the blank form of assignment that was used and showed him how to fill it out; that Williams then stated to Curtis that he felt under obligations to his sisters; that they had done a great deal for him; that he felt indebted to them for what they had done for him in years past and he wanted to provide for them as they had not any amount of means, and he wanted them to have his life insurance in case of his death; that Curtis then told Williams all he would have to do in such case was to fill out the assignment, making the policy run to them, and attach it to his policy; that Williams then filled out the blanks and signed the assignment, and he, Curtis, witnessed it; that when the second policy, the one for \$5000, came, substantially the same thing was repeated, Williams stating the same reasons for so doing; that the policy in each case was right there on the desk before them when the conversation was had and the assignment made and witnessed; that Curtis told Williams where to attach the assignments, although he could not testify that he saw them attached by Williams; that afterwards, on several occasions, after Williams had trouble in his family relations,

Williams told Curtis he was glad that he had his insurance assigned to his sisters, so that they could get it in case of his death."

It seems, from the evidence, that Williams and his wife were estranged, and that he attached the blame to her relatives. Several witnesses with whom he boarded at different times between the date of the policies and his death, testified to conversations with him,—some of them but a few months, only, before his death,—and in which he stated that he had fixed his life insurance so that his two sisters (the petitioners) would get it; that he had every confidence that they would see that his little girl was well taken care of and educated; that he had informed his sisters of the assignments to them and that they understood his wishes, and he had no fear that they would not carry them out; that he did not want his wife to handle the money on account of her relatives; that if they handled it there would be nothing left for his child when she would need it. He told these witnesses that the amount of his insurance was \$25,000, and it seems that this amount was made up of the \$15,000 in question in this case and \$10,000 more, which had been made payable directly to his sisters. The two policies here in question were payable to his legal representatives, as before stated, and neither the policies, nor any assignment or memorandum thereof, had ever been delivered to the petitioners, nor had any notice been given to the company of any such assignments, nor had any note thereof been entered upon the company's books. It is claimed, however, by the petitioners, that though insisting that no such delivery or notice was necessary, the evidence showed that the petitioners were informed of the assignments and accepted or acquiesced therein, and that the company had notice of the assignments through its agent, who was a witness thereto, and who advised Williams as to the manner in which he could accomplish his object.

The probate court granted the prayer of the petitions, but on appeal to the circuit court, and on a hearing there, this order was reversed and the two policies and proceeds thereof were adjudged to belong to Williams' estate. The decree of the circuit court was reversed by the Appellate Court on appeal, it being there determined, as it had been in the probate court, that the petitioners were entitled. The case is now before us on appeal by the administratrix.

Question is made as to the admissibility of some of the testimony, but as we have arrived at the same conclusion reached by the learned chancellor of the circuit court, even considering all of the evidence, no necessity is seen for discussing the question whether such testimony was properly received or not.

It seems to have been considered by the Appellate Court that the case is within the reasoning, and therefore within the ruling, of this court in *Otis v. Beckwith*, 49 Ill. 121. We think, however, there is a substantial difference between the two cases. In the *Otis-Beckwith* case the holder of the policy attached to it an assignment to a trustee for the benefit of three of his children, and notified the company of the assignment in trust, and such assignment was noted on the company's books. He also notified the trustee who accepted in writing the trust, which written acceptance the assured enclosed and preserved with the policy. In that case, in delivering the opinion of the court, Mr. Chief Justice BREESE said (p. 132): "In this case the assignment was of a chose in action, which the law did not require should be recorded; but the debtor party had notice of the assignment and entered the fact on the books of the company, and the assignee accepted the assignment in writing. Was delivery of the policy to the assignee essential to perfect the assignment? Was not the gift of this policy as complete as the nature of the thing and subject admitted? The policy was, in fact, assigned, and the aid of the court

was not invoked to compel an assignment. All had been done by the assignor that was incumbent on him to do. He notified the assignment to the assignee and attached it to the policy, retaining both in his own possession. The facts of the case do not differ essentially from the facts in the case of *Fortescue v. Barnett*, 3 Mylne & Keen, 36." And in distinguishing the case from another referred to, he further said (p. 133): "This case differs from the one under consideration only in this: that in the case reported the assignment of the policy was delivered to the assignee, the policy remaining with the donor. Here the assignment was not in fact delivered, but equivalent acts were done by the donor and assignee, the one notifying the assignee of the assignment and trust, and his written acceptance thereof, and notice to the insurance company, which was noted on their books." It is true that in the argument in the opinion much stress was laid upon the intention of the donor as the controlling element, but what was said in this regard must be read with reference to the case before the court. The intention without accompanying acts would avail nothing.

We may regard it as clearly established that it was Williams' intention that the petitioners should have this insurance, but if, from mistake of law, he failed to do those things which the law requires to carry his intention into effect, mere proof of his intention, however positive and convincing, cannot change the title to the property. Undoubtedly the intent is of vital importance, and as was said in *Weber v. Christen*, 121 Ill. 91, in reference to the delivery of a deed, "the crucial test, in all cases, is the intent with which *the act or acts relied on as the equivalent or substitute for actual delivery were done.*" It was said also in the *Otis-Beckwith* case (p. 136): "We have examined the case thus far with reference alone to the acts and intention of the intestate, and from them we are satisfied that he did all that was expected for him to do in order to complete the transfer of the policy." Whatever may have

been the intention of the deceased, if his acts in undertaking to dispose of the policies in question are of a testamentary character they cannot prove effectual, there being no compliance with the Statute of Wills. *Comer v. Comer*, 120 Ill. 420.

It was not intended by anything said in the *Otis-Beckwith* case to change the rule, which we regard as settled law, that it is necessary to the validity of all gifts, whether *inter vivos* or *causa mortis*, that there be delivery of the subject of the gift or acts equivalent to a delivery. We consider it unnecessary to review to any considerable extent the authorities on this question, but reference may be had, among others, to the following cases: *Telford v. Patton*, 144 Ill. 611; *Barnum v. Reed*, 136 id. 388; *Bovee v. Hinde*, 135 id. 137; *Richardson v. Richardson*, 148 id. 563; *Byars v. Spencer*, 101 id. 429; *Hoig v. Adrian College*, 83 id. 267; *Baskett v. Hassell*, 107 U. S. 602; 108 id. 267; *Trough's Appeal*, 75 Pa. St. 115; *Palmer v. Merrill*, 6 Cush. 282; *Foster v. Gile*, 50 Wis. 603; *Dexter Savings Bank v. Copeland*, 77 Me. 263; *Flanders v. Blandy*, 45 Ohio St. 108; *May on Insurance*, (3d ed.) sec. 390; 2 Kent's Com. 438, 439; *Young v. Young*, 80 N. Y. 422; *Trimmer v. Danby*, 25 L. J. Ch. 424; 8 Am. & Eng. Ency. of Law, 1316.

In *Telford v. Patton*, *supra*, it was said (p. 619): "There are three requisites necessary to constitute a *donatio causa mortis*: (1) The gift must be with a view to the donor's death; (2) it must have been made to take effect only in the event of the donor's death by his existing disorder; (3) there must be an actual delivery of the subject of the donation. * * * It is essential to a donation *inter vivos* that the gift be absolute and irrevocable; that the giver part with all present and future dominion over the property given; that the gift go into effect at once, and not at some future time; that there be a delivery of the thing given to the donee; that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.'"

In *Baskett v. Hassell*, 107 U. S. 609, in speaking of certain decisions of the Supreme Court of Tennessee as, in meaning, in accord with the general doctrine, it was said: "A *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent,—that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will. This statement of the law is, we think, correctly deduced from the judgments of the highest courts in England and in this country."

But, it may be asked, what acts are equivalent to or may be held a sufficient substitute for actual delivery? In the *Otis-Beckwith case* a valid trust was created. The policy was assigned to the trustee, the trustee notified, and he accepted the trust and the written evidence of his acceptance was preserved with the policy, a copy of the assignment was given to the insurance company and the assignment was noted on its books, and it was there said that the donor had done all he could do to complete the transfer. It could not, however, be so said in the case at bar. Whether viewed as an attempted assignment or creation of a trust it was incomplete. Williams complied with the condition of the policy requiring the assignment to be in writing and endorsed on the policy, but though he was informed by the "special notice" endorsed on the company's form of assignment which he used, that "duplicates or certified copies of assignments may be sent to the company to be noted and filed for the

purpose of reference and information," he took no step in this direction toward the completion of the transfer.

For the purpose of the argument we regard it as immaterial that the policy did not, in any of its conditions, undertake to make the validity of any assignment of it depend on notice thereof to the company. It must be borne in mind that (not regarding the act as of a testamentary character) Williams was undertaking to make an assignment of the policy as a gift, and at the same time, whether for convenience or other reasons, to retain it in his possession. By all the authorities, to make the gift a valid one he should, if he retained the policy, have performed such other acts looking to the completion of the gift as in cases of actual delivery, as would, under the circumstances, have been equivalent to or a substitute for such actual delivery. But he did nothing more than execute the written assignment, have it witnessed and attach it to the policy. It is true it appears from the testimony that he said he had talked the matter over with his sisters, the petitioners, and it was understood by them; but such loose statements as these cannot be regarded as equivalent to a delivery of the policy or assignments to and an acceptance thereof by them.

Nor can the mere fact that Curtis, who was an agent of the company, witnessed the assignments and furnished blanks of the company therefor, be held equivalent to the sending of copies of such assignments to the company and an entry of the same upon its books, or that Williams so regarded those facts. To notify the debtor party to a non-negotiable written contract in the manner made known by him as satisfactory, might, in the absence of the delivery of the assigned contract to the donee, well be regarded by a court of equity as one of the most important steps in the transfer in determining whether or not, by the acts of the parties, an equivalent of or substitute for actual delivery appeared. Considering the alleged gift as a gift *inter vivos*, it was still revo-

cable by the donor, and being revocable it was incomplete at the time of his death, and as the courts cannot complete an imperfect gift, the subject of it vested, with the rest of his chattels, in his administratrix.

Nor does the evidence show that Williams created a trust or constituted himself the trustee of the petitioners, and so held possession of the policies for them. That he might have done so is beside the question. It is sufficient that he did not do so, and we find no evidence in the record that he made the attempt. From a mere imperfect gift a trust cannot be deduced. (*Badgley v. Votrain*, 68 Ill. 25.) Suppose the policies had been endowment policies, payable during the life of Williams to himself. Would it be contended that a suit could have been maintained against him by the petitioners, upon the evidence in this record, for the policies, or the proceeds after their collection? And if not against him, then why in this case against his administratrix?

The most that can be said, we think, is, that Williams intended to make a gift of the proceeds of these policies, or perhaps the policies themselves, to the petitioners, and took certain steps to accomplish his purpose, but left the matter incomplete. It cannot be determined from the evidence whether he retained the policies and assignments in his possession, and refrained from all acts showing an intent to deliver them and to thus complete the gifts, in order that he might, if he thought advisable, change his mind and act as future exigencies might require, or whether he was mistaken in the law and supposed that he had done all that was required to make the gifts complete. But in either case the petitioners are without remedy.

The judgment of the Appellate Court is reversed and the decree of the circuit court is affirmed.

Judgment reversed.

THE PEOPLE *ex rel.* McCornack, County Treasurer,

v.

CAROLINE McWETHY.

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. JUDGMENTS AND DECREES—*a judgment cannot be set aside after term.* A valid judgment is binding upon the parties and upon the court, and cannot be set aside at a subsequent term except by the order of an appellate court.

2. SPECIAL ASSESSMENTS—*repeal of ordinance does not annul judgment of confirmation.* The repeal of an ordinance for a special assessment, pending an appeal from a judgment confirming it, does not justify the court in setting aside the judgment of confirmation at a subsequent term.

3. SAME—*when objection to judgment of sale for delinquent installment should be sustained.* An application for judgment of sale for a delinquent special assessment installment should be denied if the objector shows payment by him of prior installments, completion of the improvement and collection by the municipality of enough money on prior installments to pay the entire cost of the improvement and all expenses.

4. SAME—*objection that city has collected enough to pay for improvement may be made in the county court.* An objection to an application for judgment of sale for a delinquent assessment installment, that the city had collected enough on former installments to pay all costs of improvement and expenses, may be raised and determined in the county court.

5. SAME—*effect of statutory provision requiring excess of assessment to be refunded.* The provision of the statute (Rev. Stat. 1874, p. 239, sec. 47,) requiring the excess collected on assessment to be "refunded ratably to those by whom it was paid," does not justify a court in entering a judgment of sale for a delinquent installment when it appears that the proceeds of such installment are not needed.

6. TAXES—*application for judgment of sale for taxes—what makes a prima facie case.* The tax collector's sworn report of the list of delinquent lands, together with the proof of publication thereof and notice of application, makes a *prima facie* case on application for judgment of sale for delinquent taxes.

7. SAME—*objector must overcome prima facie case made by collector's report.* One objecting to the entering of a judgment of sale for a delinquent assessment must produce sufficient proof to overcome the *prima facie* case made by the collector's report, and raise a presumption that the allegations contained in his objections were true.

APPEAL from the County Court of Kane county; the Hon. M. O. SOUTHWORTH, Judge, presiding.

FRANK W. JOSLYN, State's Attorney, and FRANK G. PLAIN, City Attorney, (ALSCHULER & MURPHY, of counsel,) for appellant.

ALDRICH, WINSLOW & GEORGE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from the final order of the county court of Kane county, refusing judgment, on the application of the county treasurer for a delinquent installment of a special assessment, against certain lots of appellee in the city of Aurora.

The city council on the 7th day of July, 1890, passed an ordinance for the construction of a system of sewers in district No. 1, West Aurora, to be paid for by special assessment. The special assessment was confirmed by the county court and certain property owners appealed to this court, where the judgment of confirmation was affirmed on January 18, 1892. (*Walker v. City of Aurora*, 140 Ill. 402.) After the judgment of confirmation was rendered and before its affirmance by this court, and on July 28, 1891, the city council passed another ordinance for the construction of a system of sewers in the same district and in some of the same streets embraced in the first ordinance, of similar size and character as the sewers provided for by the first ordinance, and, while the first ordinance was not expressly repealed, it was insisted below, and the county court held, that it was repealed by implication, and refused to render judgment for the fourth installment of the assessment levied under it, the previous installments having been paid. After this court had affirmed the judgment in the *Walker case*, on February 2, 1892, the city council repealed the second ordinance and proceeded to let the contracts for the construction of, and to construct, the sewers under the first ordinance

of July 7, 1890. The assessment was divided into five installments. The first three were paid, and the entire assessment having proved unnecessarily large, the fifth installment was remitted by order of the council, and the fourth being delinquent, application was made by the county treasurer for judgment and order of sale.

Many objections were filed in the county court, but all those insisted on here may be stated in two propositions: First, that the ordinance under which the assessment was levied was repealed by the subsequent ordinance of July, 1891, and that all assessments fell with the ordinance under which they were made; and second, that notwithstanding that the fifth installment was rebated the assessment is still excessive, and that more has already been collected of the first three installments than sufficient to pay for the whole system of sewers completed and all costs and expenses incurred in their construction, and that if the fourth installment were paid it would be the duty of the city to return it to those who paid it, and therefore no judgment should be rendered. The county court sustained the first objection and overruled the second.

In sustaining the first objection there was error. The judgment of confirmation of the assessment under the first ordinance was a final judgment, and remained in full force and effect notwithstanding the ordinance of July, 1892, and the court which rendered it could not set it aside or deny its binding force at a subsequent term, but the court, as well as the city and all parties to it, was bound by it. This question was fully considered and decided by this court in *McChesney v. City of Chicago*, 161 Ill. 110. See, also, *Keeler v. People*, 160 Ill. 179, and *People v. Green*, 158 id. 594.

Under assignments of cross-errors appellee questions the ruling of the court in overruling the second objection, and insists that that objection should prevail and the order refusing judgment should be sustained on that

ground. The collector's sworn report of the list of delinquent lands, together with the proof of publication thereof and notice of application, made a *prima facie* case, upon which it was the duty of the court to enter judgment unless good cause was shown to the contrary. (*People v. Givens*, 123 Ill. 352, and cases cited.) Appellee assumed this burden of proof, and undertook to overcome the case made by the People by proof that there had been collected from the first three installments \$60,530.89, and that, as appellee claims, the total cost of the improvement was but \$56,330.89, and hence, it is said, there is no warrant in law for the collection of the fourth installment or any further sum from the property owners. The contention on the part of the People is, in the first place, that the county court has no authority to compel the city to enter into a general accounting in such a proceeding, to show what has been collected and how it has been disbursed, and how much may be required to pay in full for the improvement and the costs and expenses attending the same, but it is claimed that a court of chancery is the proper forum for such a proceeding; and it is further said that the statute provides that "if too large a sum shall at any time be raised, the excess shall be refunded ratably to those by whom it was paid," (Rev. Stat. chap. 24, art. 9, sec. 47,) and that the statute must govern, and if too much money is collected to pay for the improvement, the duty then devolves upon the city, after all legitimate expenses have been paid, to refund the balance to the tax-payers ratably, and that this duty can be enforced by appropriate action.

We are inclined to the opinion that it would have been a proper defense to prove that appellee had paid all prior installments assessed against the property; that the work had been completed, and that a sufficient amount had already been collected by the city on the first three installments to pay the entire cost of it, and all the expenses, and the cost of levying and collecting the assessment.

The amount to be raised by the special assessment proceeding is governed by the estimate of the cost of the work and expenses. The 20th section of article 9, making provision for ascertaining the amount to be raised, provides that the commission appointed for the purpose "shall make an estimate of the cost of the improvement contemplated by such ordinance, including labor, materials and all other expenses attending the same, and the cost of making and levying the assessment." The assessment could be made for no other purpose than that provided by the statute, and if the actual cost of the work proved to be less than that estimated by the commission, and a sufficient amount of the assessment has already been collected to pay such actual cost and all the expenses and the cost of levying and collecting the assessment, it is not easy to see why payment of the remainder of the assessment should be enforced. Under the statute it would become the duty of the city to return the surplus to those who paid it, as soon as received. Then why collect it? The law never requires the performance of a useless thing. It would be something worse than an idle ceremony, for if not paid the owner's property would be sold to pay what had proved to be an excessive levy, and which, when paid, must be returned. No earlier opportunity was afforded appellee to make this defense. Section 191 of the Revenue act provides, that "if defense (specifying, in writing, the particular cause of objection,) be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be," and "shall give judgment for such taxes and special assessments and penalties as shall appear to be due;" and it further provided that "no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax

itself, shall vitiate or in any manner affect the tax or the assessment thereof." If appellee had paid her proportion as assessed against her lots, and the purpose of the assessment had been fully performed, there would remain nothing due for which to give judgment, and the court could not pronounce judgment according to the "right of the case," nor consider "the substantial justice of the tax itself," without pronouncing judgment in her favor and refusing an order to sell her property. In *City of Bloomington v. Blodgett*, 24 Ill. App. 650, it was held that in a proceeding of this character was the proper place to make such a defense, and that case was approved by this court in *Boynton v. People*, 159 Ill. 553. We cannot see that there would be any great difficulty in determining the question in the county court. When the work has been completed and the total cost and expenses have been ascertained, the municipal authorities would be fully prepared to furnish the desired information, and it is assumed they would willingly do so, and neither the property owner nor the collector would necessarily be put to any serious inconvenience in adducing the necessary evidence.

But it is pointed out that the proof adduced by the appellee does not show that sufficient has already been collected to pay for the improvement and all necessary expenses. Appellee did not prove that sufficient had already been collected to pay the cost of the improvement and all expenses attending the same, and the cost of making, levying and collecting the assessment, nor was such proof made as that, in the absence of any rebutting evidence on the part of appellant, the court could conclude that sufficient had already been collected without this fourth installment or to change the burden of proof in relation thereto. Appellee should at least have produced sufficient proof to overcome the *prima facie* case made by appellant and to raise the presumption that the allegations contained in his objections were true. (*Hutchinson v. Self*, 153 Ill. 542.) We cannot suppose, without

sufficient evidence, that the municipal authorities would endeavor to collect this fourth installment if the purpose for which it was levied had been fully satisfied by previous installments of the same assessment, especially when it is shown that they had remitted the fifth installment. Neither in the objections filed nor in the argument here is there any claim that a part, only, of the fourth installment should be collected, but the defense is that a sufficient amount was collected from the first three installments to *fully satisfy* the purposes of the assessment and that the collection of no part of this fourth installment is necessary, and counsel for appellee in their brief say: "If any part of the fourth installment was needed or necessary to complete the payments for that improvement we would not be before this court resisting payment." This statement accords with the issue made by the objections "specifying in writing the particular cause of objection," as required by the statute. This issue, and no other, should be re-tried.

The judgment is reversed and the cause remanded.

Reversed and remanded.

SARAH FREAD

v.

BENJAMIN F. FREAD *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. APPEALS AND ERRORS—*when appeal lies to Appellate Court though a freehold is involved.* An appeal lies from the circuit to the Appellate Court, in a suit involving a freehold, when the assignments of error do not question the decree fixing the rights of the parties to the land in controversy, but relate only to questions of practice.

2. RES JUDICATA—*final and unreversed partition decree settles interests of parties.* A final partition decree, entered in accordance with the admissions and allegations of a defendant's answer, precludes such defendant, in the absence of fraud or mistake, from afterwards

165	228
172	191
165	228
188	1 85

claiming, by cross-bill or otherwise, any greater interest in the land in controversy than that already adjudged him.

3. PRACTICE—a cross-bill, though a matter of right, must be filed in proper time. After a final decree has been entered, and a sale made thereunder, a cross-bill cannot be entertained which invokes a rehearing of the original cause, and if sustained would lead to a different adjudication from that already had. (*Davis v. Christian Union*, 100 Ill. 313, and *Chicago Artesian Well Co. v. Insurance Co.* 57 id. 424, distinguished and explained.)

Fread v. Fread, 61 Ill. App. 586, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

The appellees, heirs-at-law of Absolom Fread, deceased, filed their bill to the March term, 1894, of the circuit court of LaSalle county for the partition of certain lands derived from said deceased, and for the assignment of dower and homestead to his widow, the appellant. The bill alleged, among other things, that the deceased was, at the time of his death, the owner and seized in fee simple of the land, and that his children, the complainants and defendants, upon his death became and were the owners in fee simple, as tenants in common, of the land, subject only to the right of dower and homestead of said widow. At the following June term there was filed in said cause a paper writing executed by appellant, authorizing Henry Gunn to enter her appearance and to file answer for her, waiving the service of process and consenting to an immediate hearing of the cause at said term. The answer was filed June 19, and contained, among other things, the following statement: "That she admits each and every allegation in said bill contained as fully and completely as though specifically set out and answered thereby;" also, "Further answering says, that she claims homestead and dower in said premises."

The issues were made and the cause referred to the master, and was heard by the court on June 28, 1894, and

a decree rendered finding the facts as alleged in the bill, and directing the assignment of homestead and dower and partition of the premises as prayed. The commissioners appointed reported that they could not assign homestead and dower and make partition of the premises without manifest prejudice to the parties in interest. Appellant thereupon filed her consent, in writing, to the sale of her homestead and dower, and the court thereupon entered a decree ordering the sale of the premises, including the homestead and dower. The sale was made by the master as ordered, and at the following October term he filed his report of sale, which was approved. Afterward, about the first of December, at the same term, appellant, by her solicitor, Henry Gunn, filed her petition for leave to file a cross-bill in said cause. This petition was denied by the court. On the 28th of December she filed her cross-bill in said cause, making all of the other parties defendants, and charging, among other things, that on August 7, 1867, a portion of the lands described in complainants' bill was purchased by her said husband, Absolom Fread, for the sum of \$3500, and that \$2000 of said purchase money was paid from moneys belonging to her, derived from her father's estate, and that it was agreed between herself and her husband at the time, that for said \$2000 so paid by her she should have and hold an interest in the land to that amount, but that the deed was made to her said husband, and that afterward the remaining \$1500 of the purchase money was paid from the proceeds of said farm derived from their joint labor. The only reasons appearing from the record why appellant did not sooner file her cross-bill were, as stated in said cross-bill, that when she filed her answer, and later her written assent to the sale, she did not know of any person by whom she could prove the matters alleged in her said cross-bill, and had no knowledge of any legal or proper evidence by which she could maintain her said claim. The cross-bill was, on motion, stricken from the

files by the court, and the master was directed to execute a deed to the purchaser at the sale and to make distribution of the proceeds. Appellant thereupon, on March 9, 1895, moved the court for leave to re-file the cross-bill, but the court denied the motion. The order of the trial court was affirmed in the Appellate Court, and Mrs. Fread has taken her further appeal to this court.

HENRY GUNN, for appellant:

The matters alleged in said cross-bill show a resulting trust, and were proper to be set up by cross-bill. *Smith v. Smith*, 85 Ill. 189; *Van Buskirk v. Van Buskirk*, 148 id. 9.

The filing of a cross-bill is a matter of right, and requires no leave of court. *Beauchamp v. Putnam*, 34 Ill. 378; *Davis v. Christian Union*, 100 id. 318; *Quick v. Lemon*, 105 id. 578; *Starr & Curtis' Stat. chap. 22, sec. 30*.

It is never too late to file a cross-bill, so long as the court has control of the case. *Artesian Well Co. v. Insurance Co.* 57 Ill. 424; *Morrison v. Morrison*, 140 id. 568; *Davis v. Christian Union*, 100 id. 318.

MCDUGALL & CHAPMAN, for appellees:

In all cases involving a freehold appeals shall be taken directly to the Supreme Court. *Starr & Curtis' Stat. 1842*.

A freehold is involved in a partition proceeding. *Bangs v. Brown*, 110 Ill. 96; *Carter v. Penn*, 99 id. 390.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellees insist here, as they did in the Appellate Court, that the appeal should have been taken directly to this court, for the alleged reason that a freehold is involved. We are satisfied that this question was correctly decided in the Appellate Court. The assignments of error do not call in question the decree of the trial court fixing the rights and interests of the parties in the lands in controversy, but only questions of practice in

chancery. The appeal was properly taken to the Appellate Court. *Cheney v. Teese*, 113 Ill. 444; *Walker v. Pritchard*, 121 id. 221; *Malaer v. Hudgens*, 130 id. 225; *Franklin v. Loan and Investment Co.* 152 id. 345.

There can, we think, be no doubt that appellant's cross-bill was properly stricken from the files. The rights and interests in the lands of the several parties to the cause, including those of appellant, were found and finally determined by the decree in partition, and appellant came too late with her cross-bill. The decree was in accordance with the admissions and allegations contained in her answer, and the subsequent decree of sale was in pursuance of her written assent filed in pursuance of the statute, and she was thereby precluded from claiming, by way of cross-bill or otherwise, in the absence of any showing or claim of fraud or mistake, any greater interest in the lands in controversy than had already been adjudged to her. No authority has been cited, and we know of none, holding that a cross-bill may be filed by a party defendant under such circumstances after final decree, and which would involve a rehearing and a re-determination of the original cause, and, if sustained, a different adjudication from that already made in the decree which had been rendered. The cases, viz., *Beauchamp v. Putnam*, 34 Ill. 378, *Davis v. American and Foreign Christian Union*, 100 id. 313, *Quick v. Lemon*, 105 id. 578, and *Morrison v. Morrison*, 140 id. 560, do not sustain appellant's position. The filing of a cross-bill is a matter of right and requires no leave of court, but it should be filed in proper time. (1 Starr & Curtis' Stat. p. 407, sec. 30; *Beauchamp v. Putnam*, *supra*; *Davis v. American and Foreign Christian Union*, *supra*; 3 Daniell's Ch. Pr. sec. 1745; Story's Eq. Pl. sec. 395. See, also, 5 Ency. of Pl. & Pr. 653, and collection of cases there noted.) And it does not follow that because a defendant to a bill has the right to file a cross-bill he may do so after hearing and decree, and thus call in question matters which, but for such cross-bill,

would be concluded by such decree. In the *Davis case* above cited, although the cross-bill was filed some years after the filing of the original bill, it was before the hearing. In *Chicago Artesian Well Co. v. Insurance Co.* 57 Ill. 424, it was held that a cross-bill was properly filed after a final decree, but as there said, "the cross-bill did not seek to open that decree nor to disturb any proceeding which had been had in the suit," but its sole purpose was to set aside a sale made by one of the parties after such decree was rendered.

There was no error committed in the suit at bar, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT took no part.

THE BALTIMORE AND OHIO RAILROAD COMPANY

v.

FRANK J. GAULTER *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. APPEALS AND ERRORS—*record in original cause need not be transcribed on appealing a new question.* Where, after a final determination of a cause by the Supreme Court, the parties, by motion, raise a new question wholly separable from any other question in the case and not dependent thereon, the transcript, on appeal, need not include the record and proceedings of the original cause.

2. SAME—*opinion of Appellate Court is not considered to discredit its judgment.* Where it does not appear from the judgment of the Appellate Court that a cause was not considered in that court upon its merits, what is said in its opinion cannot be considered in contradiction of its judgment.

3. CLERKS OF COURT—*clerk receiving money under a decree takes it in his official capacity.* Money paid into court under a decree is a fund of the court and under its control, and the clerk, on receiving the same, takes it in his capacity as clerk and not as the depositary of the parties, although the decree does not designate him to receive the money.

165	233
98a	1455

4. SAME—*court has jurisdiction to compel clerk to account for court funds.* Where a clerk withholds any part of a court fund to which he is not entitled, the court may, on motion of the parties entitled thereto, require him to account therefor, even though his term of office has expired.

5. SAME—*clerk must obey orders of court concerning court funds.* A clerk who disobeys an order of the court requiring him to deposit a fund in a designated bank at a certain rate of interest, must account for the loss of interest occasioned by his disobedience.

6. SAME—*clerk wrongfully retaining fund in his custody is not entitled to compensation as custodian.* A clerk who, in disobedience of an order of the court, wrongfully retains a fund in his custody is not entitled to the interest accruing thereon as compensation for his services as custodian.

7. SAME—*notice to deputy is chargeable to clerk.* A clerk of court is chargeable with the knowledge of the orders and decrees of the court concerning himself which comes to his deputies while acting in the scope of their employment, and the number of deputies employed does not affect the rule.

8. SAME—*new clerk is liable for interest received on fund turned over by former clerk.* A clerk receiving a fund from his predecessor which had been wrongfully retained in such predecessor's custody, while not chargeable with notice of the former clerk's disobedience, must account for interest on the fund which he actually receives after taking it into his custody.

B. & O. R. R. Co. v. Gaulter, 60 Ill. App. 647, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

FLOWER, SMITH & MUSGRAVE, for appellant.

MORAN, KRAUS & MAYER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Pullman Palace Car Company filed its bill of interpleader in the circuit court of Cook county, against the Ohio and Western Coal and Iron Company, the Baltimore and Ohio Railroad Company, and others, and an interlocutory decree was entered providing that upon

said complainant paying into court \$31,683.63, an injunction should issue as prayed and the complainant should be discharged. The money was paid November 6, 1889, to the appellee Henry Best, then clerk of the court. Complainant having been discharged from the suit, it proceeded between the parties claiming the fund, and was brought to this court by appeal and reported as *Warren v. First Nat. Bank*, 149 Ill. 9. Upon the cause being remanded a decree of distribution was entered July 23, 1894, under which appellant was entitled to the surplus of the fund after other specified payments should be made. The appellee Frank J. Gaulter became clerk of the court December 5, 1892, and received the principal sum then on hand, from Best. Appellant filed its motion in the suit to require said clerks, Best and Gaulter, to account for and pay over to it the interest provided for in an order entered of record in the cause June 25, 1891, during such time as the fund was in their hands, respectively. The amended motion asked that they be required to so account and pay over, or that each should account for such interest as he had actually received on said fund, as clerk, while the same was in his possession. The circuit court denied the motion, and its action was sustained, on appeal, by the Appellate Court.

It is first claimed by appellees that the case is not before this court on its merits, for want of a complete transcript of the record and proceedings in the original cause, and it is said that the Appellate Court held the transcript insufficient for a consideration of its merits. It does not appear from the judgment of the Appellate Court that the cause was not considered in that court, and what is said in the opinion cannot be considered in contradiction of its judgment. The transcript contains a complete record of the motion and all proceedings had thereon, together with a certificate of evidence which purports to contain all the evidence offered or heard upon either side in this proceeding against appellees,

and it is certified by the clerk "to be a true, perfect and complete transcript of the record." Although this proceeding was instituted under the same general title as the original cause in the circuit court, it commenced with the motion and brought up a new question in which only the parties to this appeal were concerned, and which was wholly separable from any other question in the case. The other questions were reviewed in *Warren v. First Nat. Bank, supra*, and the motion raised no issue as to matters litigated between the contending parties in the original suit. It would be neither necessary nor proper to add to the transcript of the proceedings, on this motion, the evidence or record in the original suit not related in any way to it nor offered on the hearing. There is no insufficiency in the transcript.

The facts appearing on the hearing of the motion were as follows: The fund, when received by Best, was deposited in the Illinois Trust and Savings Bank. Some payments were made out of it under orders of the court, and on June 25, 1891, the amount in the hands of the clerk was \$30,138.23. On that day the parties to the cause presented to the court their stipulation that said money so deposited with the clerk of the court should be deposited by him in the Northern Trust Company, or any other trust company or bank which might be determined upon by the court, provided such investment should bear interest at the rate of not less than two and one-half per cent per annum, and be payable on demand or within five days. In pursuance of this stipulation the following order was entered on the same day: "And now this day come all the parties to the above entitled cause, and present to the court a stipulation agreeing to the investment of the money heretofore paid into court and now in the hands of this court, and suggesting to the court the Illinois Trust and Savings Bank as a reliable company, and the court being advised of the terms on which said trust company will pay interest on deposits, it is therefore

ordered that the clerk of this court pay to the said Illinois Trust and Savings Bank the funds now in his hands and take a certificate of deposit therefor, which will bear interest at a rate not less than two and one-half per cent per annum, and be payable five days after demand." The money was then in said Illinois Trust and Savings Bank, which paid interest to the clerk monthly on the same, at the rate of two per cent per annum. The order was not obeyed. The money remained in the bank to the credit of the clerk. On November 11, 1891, there was paid out under an order of the court, to the master in chancery, \$1500. The remainder of the principal of the fund which was paid over by Best December 5, 1892, to the appellee Gaulter, as his successor, was \$28,638.23, and this sum Gaulter retained until the final decree of distribution on July 23, 1894. The bank paid to him, as it had previously paid to Best, interest on the money monthly, at two per cent per annum.

The appellees, by their answers, questioned the jurisdiction of the court over them, denied that they had any knowledge or notice of the order, alleged that each was entitled to two and one-half per cent per annum as a reasonable compensation for services as custodian of the fund, and asserted that the bank would not have accepted the money on the conditions specified in the order. There was no evidence under the claim of compensation for services as custodian, so that the claim must be regarded as abandoned.

It is argued that the court had no jurisdiction of appellees, because the money was not received by Best as clerk. The interlocutory decree did not designate the clerk as depositary nor order him to receive the money, and the argument is that he was therefore a mere depositary of the parties. That decree provided for the payment of the money into court, and it was paid by complainant and received by the clerk as a fund of the court under that decree. The court, by the order of June

25, 1891, further treated it as a fund paid into the court, and then in the hands of the clerk of the court as such. The fact that the clerk was not mentioned in the decree is immaterial. The money became a fund of the court and under its control. By its order the court designated a new depository, but the money did not cease to be a fund of the court at its disposal by the neglect of the clerk to obey the order and the retention of the money, or its subsequent transfer to appellee Gaulter. Such a result could not be accomplished by disobedience. The court had jurisdiction over appellees, or either of them, or any person into whose hands the fund might come, so long as any part of it remained unaccounted for; and the fact that Best had ceased to be clerk of the court could make no difference, if he still retained any part of the fund which he was bound to pay over. (*In re Western Marine and Fire Ins. Co.* 38 Ill. 289.) We think the court had jurisdiction to determine the question presented by the motion.

Nor was there any error in proceeding against both the appellees at the same time by the same motion. Best had the fund and had turned over the principal of it to Gaulter, and there was no impropriety in determining at the same time how much, if anything, either of them was bound to account for. Both had been dealing with the same fund of the court, and the motion was designed to fix the liability of each with respect to it.

The defense made by Best on the merits was, that he had no personal notice of the order to deposit the money. It is not denied that if he had such notice he would be bound to obey the order, and would be liable in some form of action for the consequences of a failure to do so. The order was entered by a minute clerk named Shilling, in that branch of the court in which the order was made. The general rule that a clerk is bound by notice to his deputy does not appear to be disputed; as applied to cases where a clerk has only one or a few deputies; but

the ground for exemption claimed here is that Shilling was one of a great many deputies. One of the solicitors in the case testified that he notified the chief deputy, Bradley, of the application for the order; but this was denied by Bradley, and we cannot see that the rule of law would be affected by the question which of these witnesses was right. If notice to a deputy is the legal equivalent of notice to the clerk, the rule of law would not become inoperative in case there were several such deputies. The deputy, Shilling, exercised the office in the right of Best. He had no interest in the office, and was only the shadow of the officer in whose name he acted. The information that this order was made and entered came to the deputy in the discharge of his duties within the scope of his employment. Best testified that he had no actual knowledge of the order, but he was responsible for the acts of his deputy, and must be held to have had notice of his acts and of information which came to him in the discharge of his duties.

It is urged that the remedy applied for is improper, because contempt proceedings do not lie where there is constructive notice only. But the question whether contempt proceedings would lie to enforce any order that might be made is not involved. This is not a proceeding for contempt of the authority of the court. Nothing is sought except a determination of the rights of the parties in respect to a fund at the disposal of the court, and an order to pay over the interest. How such an order could be enforced is not in question.

It is also contended that if the fund was received by appellees as clerks, by virtue of their office, then they were guarantors of its safety and entitled to the interest. The rule, if it exists as contended for, cannot apply because the order designated another depositary, and if complied with the clerk would not have remained liable, as guarantor or otherwise. It is plain that if Best had taken the certificate of deposit he would not have been

liable for the safe keeping of the fund which the parties had stipulated and the court had ordered should be removed from his custody and deposited for such safe keeping elsewhere. He remained custodian by his own wrong, and should not be permitted to gain a benefit by disobedience.

It is said that the order could not be carried out for the reason that the bank would not issue such a certificate. It was proved that the Northern Trust Company, which was specifically named in the stipulation, agreed with one of the solicitors that it would issue such a certificate. It was paying interest at two and one-half per cent at that time on deposits of the character required by the order. It was named in the order as drawn by the solicitors, and was admitted by appellees on the hearing of this motion to be a perfectly sound and solvent institution and a similar organization to the Illinois Trust and Savings Bank. The chancellor struck out the Northern Trust Company from the order as prepared and substituted the Illinois Trust and Savings Bank. The cashier of the latter bank testified that his bank was not at that time issuing five-day certificates, but commenced subsequently to do so, and he could not answer whether, if the clerk had applied for such a certificate as named in the order, he could have obtained it. The chancellor who made the change stated that he knew, of his own personal knowledge, that both of said banks were ready to issue such a certificate of deposit as was called for in the order, and he requested that his statement should go into the record. Counsel for appellees consented, and the statement was put into the record accordingly. The evidence does not show that the Illinois Trust and Savings Bank would not have issued the certificate. It was the duty of the clerk to obey the order, and if a certificate could not be obtained of the character specified from the bank named, to report that fact to the court. The stipulation named the Northern Trust Company,

which would have issued the certificate, and if the other bank would not have done so it is to be presumed that the stipulation would have been followed and the order changed. But, as before stated, the evidence does not show that the order as made could not have been complied with. Best received two per cent upon the money, but by his wrongful disregard of the order one-half of one per cent was lost. We think he should be required to account for the two and one-half per cent that he would have received if he had obeyed the order, and that appellant should not suffer for his disregard of it.

As to the appellee Gaulter, it appears that he received the money from his predecessor, Best, without any knowledge or information of the order. It had been entered long before, and he undoubtedly had the right to presume that his predecessor had complied with all orders of the court. It would scarcely be incumbent upon him to search the records to ascertain what orders had been previously entered. Still, the fund was in his hands in violation of the order of the court. The parties had agreed, and the court had ordered, that it should be deposited elsewhere. The Illinois Trust and Savings Bank had been designated as depositary, and if the order had been obeyed the fund would have produced interest. While it was in his hands it did actually produce interest at two per cent, and whatever his right to retain interest in other cases might be, we think that he could not be permitted to retain the interest so actually received to the injury of appellant. He should be required to account for interest received by him.

The order of the circuit court and the judgment of the Appellate Court are reversed, and the cause will be remanded to the circuit court with directions to enter an order in conformity with the views herein expressed.

Reversed and remanded.

WILLIAM HAFNER

v.

J. B. HERRON, for use, etc.

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. **BROKERS**—*broker need not actually introduce the purchaser to his principal.* A broker employed to sell property, who in good faith induces a party to go to his principal, is entitled to a commission if a sale is effected to such party through his efforts or information derived from him, though he does not personally introduce the purchaser to his principal.

2. **SAME**—*broker entitled to commission though principal effects a sale on his own terms.* Where a principal consummates a sale of his property to a purchaser sent by his broker, on different terms than those which he proposed to the broker, the latter is not thereby deprived of his right to commission.

3. **SAME**—*broker acting in bad faith is not entitled to commission.* A broker concealing the real purchaser from his principal, thereby inducing him to sell at a less price than he would have done had the purchaser been disclosed, is not entitled to a commission though no fraud was intended,—not because of the injury to his principal, but from considerations of public policy.

4. **APPEALS AND ERRORS**—*one cannot complain of error in opponent's instructions where his own contain the same error.* Where a plaintiff's instructions upon his right to recover commission from the defendant for a sale of property omit the element of good faith and loyalty to the defendant, the latter cannot complain of such error where his own instructions are chargeable with the same defect.

Hafner v. Herron, 60 Ill. App. 592, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

This is an action of assumpsit, brought by the appellee, Herron, against the appellant, Hafner, to recover certain commissions, alleged to be due from the appellant to the appellee for a sale of certain shares of stock by the appellee for the appellant. The declaration alleges, that the appellant owned 251 shares of stock in a corporation known as the Hartt Manufacturing Company, and

165	242
71a	653
165	242
83a	875
165	242
86a	173
165	242
185	453
87a	277
165	242
192	4 25
165	242
102a	*874
165	242
108a	*457
165	242
108a	151
109a	490
165	242
209	*882
209	883
165	242
115a	*522

made an agreement with appellee, that, if appellee would negotiate and sell said shares of stock, appellant would pay him five per cent on the first \$10,000.00 of the purchase money and two and a half per cent on the balance; that appellee accepted the conditions of the agreement and sold the stock. The plea was the general issue. The case was tried before a jury and resulted in verdict and judgment in favor of appellee. Upon appeal to the Appellate Court the judgment has been affirmed, and the present appeal is from such judgment of affirmance.

The material facts are as follows: The Hartt Manufacturing Company was engaged in manufacturing soda fountains under a patent owned or obtained by appellee; appellee had been selling these soda fountains on commission, and had been connected with the appellant in business for more than four years; appellant owned a controlling interest in the company; appellee's wife owned some stock, and one Herman Huff and one Herman Will were also stockholders therein. There was some dissatisfaction among the stockholders with the policy of the appellant. Appellee proposed to sell his wife's stock to appellant, but appellant refused to buy, and said that he would sell out his own stock, and authorized appellee to get a man to buy him out. Early in July, 1894, appellee brought to appellant a man by the name of Stein, who, after examining the books and stock, offered \$45,000 for appellant's interest; but appellant refused to take this sum, and the purchase was not made by Stein.

Afterwards appellee wrote to one Charles W. Tufts of Boston, proposing to him to buy appellant's interest. About the first of September Tufts came to Chicago and had an interview with Herron and Will and Huff. At that interview it was arranged, that Huff should go to appellant and make the purchase. Huff testified, that, at that conversation between him and Tufts and Herron as to the purchase of the stock, it was said that, if Hafner should know that Tufts was buying the stock, he

would not sell out so leniently, and by making Hafner believe that he, Huff, wanted the stock for his friends, or by letting him think so, that the deal would be sooner consummated. On September 4, 1894, Huff went to appellant, and submitted a written proposition or contract, which appellant signed, and in which it was stated that appellant received of Huff \$2000.00 on account of the purchase price of \$45,000.00 for said 251 shares of stock, and in full of the amount due on open account as shown on the books, and that the balance of \$43,000.00 was to be paid to Hafner on September 8, 1894; and therein appellant agreed to transfer his stock to whomsoever Huff might direct; and it was also therein provided, that if the \$43,000.00 should not be paid on or before that date, the \$2000.00 should be forfeited to appellant, and the agreement terminated; and that the business was to be taken by Huff, or his assignee of the stock, as shown by a statement therein mentioned; and that, if the assets and liabilities should not be found as reported by such statement, then the \$2000.00 should be returned to Huff, etc. When this paper was signed by appellant, he did not know that Tufts proposed to buy the stock, or that any negotiations were pending with Tufts; nor had he at that time been informed, that Herron had anything to do with the purchase proposed to him by Huff. Afterwards, on or about September 8, Herron brought Tufts to appellant, and introduced him to appellant, and Tufts said that, if appellant would go with him, he would pay the balance of the money. Tufts did pay said money to appellant, and the sale of the stock to Tufts was thus consummated for the sum of \$45,000.00.

E. S. CUMMINGS, for appellant:

A real estate broker employed to find a purchaser for land is bound to disclose to his principal any facts known to him, material to the transaction. *Young v. Hughes*, 32 N. J. Eq. 372.

The intentional concealment of important facts by a broker from his principal, when selling real estate, will deprive him of his right to procure a buyer. *Pratt v. Patterson's Exrs.* 112 Pa. St. 475.

Where an agent is unfaithful to the trust and abuses the confidence reposed in him by his principal, he may be deprived of commission or compensation. *Sea v. Carpenter*, 16 Ohio St. 412.

The dealings of an agent with his principal will not, in any case, be deemed binding on the principal unless they are accompanied with the utmost good faith on the part of the agent. 1 Evans on Principal and Agent, 378; Wharton on Agency, sec. 336.

WILLIAM R. EVERETT, for appellee:

It is not indispensable that the purchaser be introduced to the owner by the broker, nor even that the broker himself should be personally acquainted with the purchaser. *Sussdorf v. Smith*, 55 N. Y. 320; *Stewart v. Mather*, 32 Wis. 334; *Cook v. Fischer*, 12 Gray, 491; *Lincoln v. McClatchie*, 32 Conn. 136; *Carter v. Webster*, 79 Ill. 435.

It must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the agent. *Greggs v. Bow*, 43 N. Y. 324; *Sussdorf v. Smith*, 55 id. 320.

If the purchaser had his attention directed to the premises through the advertisement of the broker, the latter is entitled to his commission although the purchaser did not see the broker or go to his office. *Lincoln v. McClatchie*, 32 Conn. 136; *Dirkie v. Railroad Co.* 29 Vt. 127; *Ellis v. Dunsworth*, 49 Ill. App. 187.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

It is claimed by appellant, that, after the failure of the proposed sale of the stock to Stein, he revoked his authority previously given to appellee to sell the stock as

his agent, and that thereafter appellee had no authority to act as his agent in that regard. On the contrary, it is claimed by appellee, that, after the failure of the negotiations with Stein as well as before, he was still instructed by appellant to procure a purchaser for the stock, and was told that, if he did so, he would be paid the commission mentioned in the declaration. The main issue of fact upon the trial in the court below was, whether or not appellee was authorized to act as the agent of the appellant in negotiating the sale which was finally consummated. The parties to the suit contradicted each other upon the question of fact as to whether appellee was agent or not. The instructions on both sides, as given to the jury by the trial court, submitted the question of the existence of such agency.

The appellant now raises a new question not relied upon in the trial court. The new contention is, that appellee was guilty of a want of good faith towards appellant in his negotiations with Tufts for the sale of the stock, and that, on account of such want of good faith, he is not entitled to claim any commissions. There is evidence in the record, which would have justified the submission of the question of good faith to the jury under proper instructions. The fact, that the appellee employed Huff to aid him in the consummation of the sale, was not of itself evidence of a want of good faith. One broker may assist another in making a sale. (*Carter v. Webster*, 79 Ill. 435). Nor is it always necessary, that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively, that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. (*Sussdorf v. Schmidt*, 55 N. Y. 319; *Stewart v. Mather*, 32 Wis. 344; *Lincoln v. McClatchie*, 36 Conn. 136). It is also true, that, where the seller consummates

a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions. (*Stewart v. Mather, supra*). But it is well settled, that if an agent or broker is employed to transact a particular piece of business, and in the transaction is guilty of bad faith to his principal, he thereby forfeits his commissions. (Wharton on Law of Agency, sec. 336.) It is said by Story in his work on Agency, that "the agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency in regard to his principal." (Story on Agency, sec. 331). There is a want of good faith on the part of the agent towards his principal, when he acts adversely to his principal's interest, or where, representing the seller, he conceals from him an arrangement intended for the advantage of the buyer. (Story on Agency, sec. 334; *Pratt v. Patterson's Exrs.* 112 Pa. St. 475; *Prescott v. White*, 18 Ill. App. 322). In the application of this rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not; in such case, the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal. "It matters not, that there was no fraud meant, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." (*Young v. Hughes*, 32 N. J. Eq. 372). In the present case, if by a preconcerted arrangement between appellee and Huff and Tufts, the fact, that Tufts was to be the purchaser, was concealed from appellant with a view of inducing him to sell the stock to Tufts at a less price than he otherwise would have done, then appellee was not faithful to his obligations as appellant's agent. While he was acting in the interest of appellant, it was his duty to obtain as high a price as possible for the stock. He could not be permitted, under the law, to seek to serve the interest of Tufts, the purchaser, by bringing about a sale at a reduced price. In such case he would be acting

both for appellant and for Tufts. It is well settled, that the same man cannot act at the same time as agent for both seller and buyer. His duty to one is inconsistent with his duty to the other. (*Warrick v. Smith*, 137 Ill. 504; *Stewart v. Mather*, *supra*; Wharton on Agency, sec. 715).

But it appears from the evidence, that, after the written memorandum presented by Huff was signed, appellee came with Tufts to appellant, and presented Tufts as the purchaser of the property. Appellant thereby became informed, before the sale was consummated by the payment of the \$43,000.00, that Tufts was the purchaser of the stock, and that Herron was concerned in securing him as a purchaser. Notwithstanding the knowledge thus obtained, appellant made no objection to the sale, but carried it out as already arranged, and received the \$43,000.00. He might have then repudiated the sale. If there was any misconduct on the part of the appellee, Huff and Tufts incited it, and were partakers in it, and obtained the contract by means of the misconduct which they had thus suggested and aided. Under such circumstances, they could not have asked a court of equity to exercise its discretionary powers to enforce the contract so obtained. (*Young v. Hughes*, *supra*). While, therefore, the evidence discloses certain circumstances, from which a want of good faith on the part of the appellee towards appellant might be inferred, yet it also discloses the fact, that appellant, after knowledge and information of those circumstances, neglected to exercise his privilege of canceling the contract, but, on the contrary, accepted the benefit of what appellee had done.

Appellant's counsel contends, that, at the close of all the testimony, the court should have instructed the jury to find for the defendant. No written instruction to that effect was submitted to the court. But if a mere verbal motion to instruct for the defendant was sufficient without the submission of a written instruction to that effect, the court would not have been justified in taking the

question of good faith away from the jury. The evidence was not conclusive as to a want of good faith, and there were circumstances in favor of, as well as against, the appellee upon that issue. This being so, it was for the jury to weigh the evidence and ascertain where the preponderance was. (*Wenona Coal Co. v. Holmquist*, 152 Ill. 581). Hence, it would have been proper to instruct the jury to find whether or not appellee was guilty of any misconduct towards appellant in the matter of the negotiation of the sale.

But neither party asked any instruction from the court upon the subject of the good faith of appellee in making the sale. The appellant asked only two instructions which were both given. By the first of these the jury were told, that, before a principal can be bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for and on his behalf, and that such agent carried out the business of his principal and within the scope of his authority as such agent; and that, to entitle the plaintiff to recover in this case, he must show by a preponderance of the evidence that he was acting as such agent under the direction and authority of the defendant. By the second of the instructions given for appellant, the jury were told that, in this action by the plaintiff against the defendant for commissions claimed by the plaintiff for the sale of certain shares of stock, the plaintiff, in order to secure a recovery, must show by a preponderance of the evidence, that he acted in the capacity of agent for and on behalf of such principal in securing such sale with the knowledge and consent of the defendant. It will be noticed, that these instructions do not direct the jury to find whether or not the defendant acted in good faith, and in loyalty to the interests of his principal in the performance of his agency, but merely to find whether or not he was appellant's agent, or had any right to act for him in the capacity of agent. The verdict of

the jury and the judgments of the lower courts are, so far as this court is concerned, final determinations of the fact, that appellee was appellant's agent in making the sale, and acted as such agent under the authority and with the knowledge and consent of appellant. If appellant had desired the jury to find whether or not appellee was guilty of such concealment of material facts, or of any other such misconduct, as would amount to bad faith towards appellant, he should have asked an instruction embodying that idea. The case was not tried upon any such theory, and it is too late now to advance it.

The plaintiff below only asked two instructions, which were given by the trial court. By these the jury were instructed that, where an agreement for the sale of property is entered into, the agent is entitled to his recompense if he brings the owner and buyer together; that, in such case, if the owner, in dealing personally with the buyer, agrees to accept a less sum than that mentioned to the agent, the latter is entitled to recover his commission on the amount accepted by the seller; and that, if the jury believed from the evidence, that an agreement was entered into between the parties, by which plaintiff, as agent of defendant, was to sell certain property owned by defendant and to receive a certain commission in the event of a sale through his instrumentality, and that a sale thereof was consummated with a purchaser procured by the plaintiff, the verdict must be for the plaintiff, even though the defendant accepted a less sum for the property than he had given his agent, unless the jury should believe from the evidence that the said contract, if any, had been terminated by defendant prior to said sale. No valid objection to these instructions has been called to our attention. They announce the law with reasonable correctness. There must be an employment to constitute a broker the agent of a vendor; the services of such broker or agent must be the efficient or producing cause of the sale; it is his duty to find a purchaser for the prop-

erty, to bring the purchaser into communication with his employer, and to use his efforts to forward the negotiation in the interest of his employer; having introduced a sufficient purchaser to the owner, he is not to be deprived of his commissions, because the owner negotiates the contract himself, or voluntarily reduces the price of the property. (*Earp v. Cummins*, 54 Pa. St. 394; *Chilton v. Butler*, 1 E. D. Smith, 150; *Young v. Hughes*, 32 N. J. Eq. 372; *McClave v. Paine*, 49 N. Y. 561; *Stewart v. Mather*, 32 Wis. 344; *Wilson v. Mason*, 158 Ill. 304).

It may be said, that, in view of the evidence, in the record, the court should have so qualified the language of the instruction as to require that the sale should have been consummated, or the purchaser procured, in good faith toward the principal and with a loyal regard to his interests. But, if plaintiff's instructions were defective in this regard, the instructions of the defendant are chargeable with the same defect; and this court is committed to the doctrine, that the defendant has no right to complain of error in an instruction given for the plaintiff, when like error appears in an instruction given at the defendant's request. (*Consolidated Coal Co. v. Haenni*, 146 Ill. 614, and cases there cited).

By the judgment of the Appellate Court affirming that of the Superior Court of Cook county it is settled, under the issues presented to the jury, that appellee's authority to negotiate a sale was not revoked after the failure of the proposed sale to Stein and before the consummation of the sale finally made to Tufts.

For the reasons stated, the judgments of the Appellate Court and of the Superior Court of Cook county are affirmed.

Judgment affirmed.

JOHN V. FARWELL

v.

BESSIE MCLEOD STURGES *et al.**Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.*

1. **MOTIONS**—*what questions cannot be tried on motion for leave to file additional record.* The question whether or not a written agreement, duly entered of record in the trial court, purporting to be executed by all the parties, was in fact so executed, cannot be tried in the Supreme Court on affidavits, under a motion for leave to file a copy of such agreement as additional record.

2. **JURISDICTION**—*when party is estopped to deny jurisdiction.* Though the agreement of submission of disputed matters provided for by section 1 of the act to avoid delay in the administration of justice (Laws of 1887, p. 158,) may have been executed by the counsel for one of the parties without authority, yet if such party appears and acts thereunder and induces the court and the parties to rely upon it he is estopped to deny its binding force as conferring jurisdiction.

3. **COURTS**—*submission of matters to circuit judges for decision is not an arbitration.* The proceeding provided for in the act to enable parties to avoid delay in the administration of justice is not an arbitration, but is a proceeding in a court of general jurisdiction, either at law or in chancery, according to the nature of the case.

4. **APPEALS AND ERRORS**—*when release of errors need not be pleaded in bar in an appellate court.* Where a release of errors, as embodied in the contract of submission, appears in the record, and the trial court had jurisdiction to enter the judgment, it is not necessary to plead such release either on appeal or writ of error.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. MURRAY F. TULEY, Judge, presiding.

This is a writ of error sued out by John V. Farwell, against Bessie McLeod Sturges, James H. Wilkerson, administrator of the estate of William Sturges, deceased, and the other defendants in error, to reverse a decree entered by the circuit court of Cook county on the 21st day of June, 1894, at the June term of said court, in a proceeding in said court heard and determined by the Hon. Murray F. Tuley, one of the judges thereof, under and by virtue of an act entitled "An act to enable parties to avoid delay in the administration of justice," in force

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July 1, 1887. As the matters in controversy were, under the act in question, submitted orally and without formal pleadings, and as there is no certificate of evidence or bill of exceptions, such matters, so far as necessary to be stated, are shown principally by the decree.

The cause in the circuit court was entitled as follows: "In the circuit court of Cook county, State of Illinois.—In the matters in controversy between William Sturges and Bessie McLeod Sturges, separately, of the one part, and John V. Farwell, Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, (Limited,) of London, England, all or either of them, separately or jointly, of the other part." And the decree then recites:

"This cause coming on to be heard upon the agreements of submission herein, which are as follows:

"In the circuit court of Cook county, State of Illinois.—In the matter of difference between William Sturges, or Bessie McLeod Sturges, of the one part, and John V. Farwell, Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, (Limited,) of London, England, all or either of them, separately or jointly, of the other part.

"Submission of controversy to the Hon. M. F. Tuley, as judge of the said court, as provided by statute, and in pursuance of stipulation following:

"Stipulation of submission.—In the circuit court of Cook county, State of Illinois.

"First—We, John V. Farwell, Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, (Limited,) of the one part, and William Sturges of the other part, do hereby mutually, jointly and severally agree to submit to Judge Murray F. Tuley, of said court, certain matters in controversy between us for his determination, without a jury, he to hear the same within such reasonable time as may be proper for such

hearing, and to enter the judgment or decree of the court therein within a reasonable time after such hearing shall be concluded; that the matters submitted herein shall include all matters of difference whatsoever between the parties of the one part, or either of them, and the parties of the other part, or either of them, excepting only the matters at issue between Bessie McLeod Sturges and the said John Farwell in a certain cause pending in the United States Circuit Court for the Northern District of Illinois. All other suits or proceedings, of every name and nature, between the parties of the one part, or either of them, shall be dismissed, discontinued and withdrawn, without prejudice to the rights of any party hereto.

"Second—That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

"Third—That no record, except of this agreement and of such judgment or decree, shall be made as to the matters in controversy so submitted, or as to the proceedings had on the hearing thereof.

"Fourth—That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

"Fifth—That we, each to the others, hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted and in the entering up of the judgment or decree therein, and agree that this release of errors may be plead in bar of any writ of error that may be issued out as to such judgment or decree.

"Witness our hands and seals this 23d day of May, 1892.

JOHN V. FARWELL, [Seal.]

CHARLES B. FARWELL, [Seal.]

ABNER TAYLOR, [Seal.]

THE CAPITOL FREEHOLD LAND

AND INVESTMENT COMPANY. [Seal.]

WILLIAM STURGES. [Seal.]

"Stipulation between Bessie McLeod Sturges and John V. Farwell, whereby the matters involved in the suit in Marquette county, Michigan, as shown in the pleadings hereinbefore set out, are submitted for adjudication in this proceeding.

"It is stipulated between John V. Farwell, by his solicitor, George F. Westover, of the one part, and Bessie McLeod Sturges, joined with William Sturges, of the other part, as follows:

"Whereas, on the day, 1891, the said Bessie McLeod Sturges filed her bill of complaint against John V. Farwell, Richard P. Travers and William Sturges in the circuit court for Marquette county, in the State of Michigan, wherein the said Bessie McLeod Sturges claimed a certain interest or equity of redemption in certain lots or real estate situated in the said county of Marquette and State of Michigan; and whereas, in the year 1892 the said John V. Farwell, together with Charles B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, (Limited,) of the one part, entered into an agreement in writing with the said William Sturges, whereby, as provided by the statutes of the State of Illinois, the said parties agreed to submit to Murray F. Tuley, a judge of the circuit court of Cook county, in the State of Illinois, all matters of difference between the said William Sturges and the said John V. Farwell and others, and each of them, said matters to be heard by the said Judge Murray F. Tuley without a jury; and whereas, in consideration of the agreements herein contained, the said Bessie McLeod Sturges is to dismiss her said bill of complaint filed in the circuit court of Marquette county, in State of Michigan, as aforesaid:

"Now, therefore, it is hereby agreed that the said Bessie McLeod Sturges shall dismiss the said cause pending in the said circuit court of Marquette county, as aforesaid, and that all the matters in controversy therein, and all the other matters in controversy, if any, between the

said Bessie McLeod Sturges and said John V. Farwell, or between said Bessie McLeod Sturges and either of the other parties to the said agreement of submission to the said judge of the circuit court of Cook county, as aforesaid, shall be and hereby are included within the said submission, and shall be and hereby are submitted to the said Murray F. Tuley, to be heard and adjudged by him at the same time and under the same conditions, specifications and stipulations as he shall hear and adjudge the matters to be submitted to him by the stipulations of the said William Sturges and the said John V. Farwell and others already entered into as aforesaid.

September, 1893.

BESSIE MCLEOD STURGES,

JOHN V. FARWELL,

By GEORGE WESTOVER, *his attorney.*"

"And the said parties to the said agreements of submission and to the cause being present, with their respective solicitors and attorneys, and the court having obtained full jurisdiction of said parties and of the matters in controversy between them, and having heard the evidence, both oral and written, produced and offered by said parties, respectively, and having heard the arguments of the respective counsel and attorneys, and being fully advised in the premises, doth find, determine and adjudge and decree as follows:

"That the matters in controversy between said parties, and so submitted by the said parties to the said two agreements of submission for the final determination and adjudication of this court, are found, adjudged and decreed to be as follows:

"*First*—As to the respective right, title and interest of the said William Sturges and the said John V. Farwell, Charles B. Farwell and Abner Taylor, hereinafter referred to as the 'Syndicate,' in and to a certain contract made between the said persons composing said syndicate and Kensington & Co. bearing date the 13th day of July, 1885, which said contract is as follows:

"The Kensington Contract, between Kensington & Co. and John V. Farwell, C. B. Farwell and Abner Taylor, July 13, 1885.

"Memorandum of agreement, made on the 13th day of July, 1885, between John Villiers Farwell, of Chicago, in the United States of America, but now temporarily residing at No. 49 Dover street, Picadilly, in the county of Middlesex, merchant; Charles Benjamin Farwell, of Chicago aforesaid, merchant, and Abner Taylor, also of Chicago aforesaid, merchant, of the one part, and Kensington & Co. of No. 1 George street, Mansion House, in the city of London, advertising contractors, of the other part:

"Whereas, by an agreement made on or about the 1st day of June, 1885, between the said Abner Taylor of the first part, John Villiers Farwell and Charles Benjamin Farwell of the second part, and William Chase Prescott, as manager for and trustee on behalf of the Capitol Freehold Land and Investment Company, (Limited), of the third part, the said Abner Taylor sold, and the company purchased, certain lands situate in the Pan Handle of Texas, therein particularly described, at the price therein mentioned; and whereas, by an agreement bearing even date herewith and made after the making hereof, between the company of the one part and the said Kensington & Co. of the other part, the company agrees with the said Kensington & Co. that the said Kensington & Co. shall issue debentures upon the terms set forth in said agreements; and whereas, John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor, for good and sufficient reasons, are desirous that the said subscription for debentures shall be made as quickly as possible, and have agreed with the said Kensington & Co. that in consideration of their entering into the agreements hereinbefore last recited they will allot, or cause to be allotted, or transfer, or cause to be transferred, to the said Kensington & Co., or their nominees, fully paid-up shares in the company, in manner hereinafter provided: Now it is hereby agreed as follows:

"1. After setting aside or allotting 13,000 fully paid-up shares, in pursuance of the terms of the agreement of the first of June, 1885, in respect to £200,000 worth of debentures subscribed for in America and £60,000 worth of debentures to be subscribed for in England. Before the prospectus inviting subscriptions for debentures is issued, the parties hereto of the first part shall set aside 37,000 fully paid-up shares, to be disposed of as follows: 3500 of such shares are to be allotted *pro rata* as bonuses to the applicants for the first £140,000 worth of debentures subscribed for, and 3500 *pro rata* to the said Kensington & Co., as they may direct, and when the said debentures are subscribed for.

"2. If, within six months from the date of the issue of the first debenture prospectus, the said John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor shall be of opinion that the subscription for debentures are not being made sufficiently rapid to meet the needs of the company, they shall notify such opinion to said Kensington & Co., and shall thereupon be at liberty to themselves take such measures auxiliary to those of the said Kensington & Co. as they may think fit, until £400,000 worth of debentures shall have been subscribed for, but in respect to the debentures subscribed for wholly in consequence of such auxiliary measures no shares shall be allotted to the said Kensington & Co. under this agreement.

"3. The residue of the said shares shall be allotted to the said Kensington & Co., or as they may direct, in the proportion of one £10 share fully paid up for every £20 of nominal value subscribed for in the debentures, as and when the same shall be subscribed for.

"4. If the £260,000 referred to in paragraph 1, or any part thereof, is not raised in manner hereinbefore referred to, the same, or such part thereof as shall not have been so raised, shall form part of the debentures, the subscriptions for which are to be obtained by the said Kensington & Co., and the bonuses of fully paid shares payable in

respect thereof, in accordance with the terms of the herebefore recited agreement of the first of June, 1885, shall be paid to the said Kensington & Co. or as they may direct, but the parties hereto of the first part shall be at liberty to obtain subscriptions for the same: *Provided always*, that if any subscriptions shall be obtained in Europe otherwise than through the said Kensington & Co., they shall, nevertheless, be entitled to receive the shares they would otherwise be entitled to under this agreement as if they had obtained the said subscriptions themselves.

"5. The said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor undertake and agree, that if, in pursuance of sub-section 2 of article 2 of the herebefore recited agreement of the first of June, 1885, they shall demand and receive from the company the whole or any part of the £600,000 debentures, that they will not sell or cause the same to be sold in Europe except through the said Kensington & Co. and under the terms of this agreement: *Provided, however*, that the said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor may transfer not exceeding £25,000 thereof in payment for stores, machinery or materials supplied to them by any firm, company or person in Europe. And it is hereby further agreed, by and between the said parties hereto, that whereas, the said Kensington & Co. are entitled to receive from the company two per cent upon the nominal amount of debentures subscribed for, in pursuance of the agreement bearing even date herewith and herebefore referred to, the said Kensington & Co. shall return to the said Charles Benjamin Farwell, John Villiers Farwell and Abner Taylor shares to which they, the said Kensington & Co., shall be entitled to under this agreement, to a number equal in nominal amount to the sum received by the said Kensington & Co. from the company, as and when they shall receive the same; but this condition shall not apply to the two per cent paid to the said Kensington & Co. in respect of any debentures subscribed for

solely through the parties hereto of the first part, in pursuance of articles 2 and 4 thereof.

"7. In the event of any of the applicants for the debentures in the company desiring to receive interest upon the amount advanced by them at the rate of seven per centum per annum in lieu of five per centum with a bonus in fully paid shares, then the said Kensington & Co. shall not be entitled to receive any portion of the said bonus which would have been paid to such applicants, but the same shall belong to the said John Villiers Farwell, Charles Benjamin Farwell and Abner Taylor, but Kensington & Co. shall be entitled to receive the amount of shares payable to them in pursuance of this agreement as if the bonus had been paid to the applicants.

"As witness the hands and seals of said parties.

JOHN V. FARWELL, [Seal.]

CHARLES B. FARWELL, [Seal.]

By JOHN V. FARWELL, *his attorney in fact.*

ABNER TAYLOR. [Seal.]

By JOHN V. FARWELL, *his attorney.*

"Signed, sealed and delivered by the within named John V. Farwell, Charles B. Farwell and Abner Taylor, in the presence of Traves T. Briant, clerk to Snell, Son & Greenip, solrs., 1 and 2 George St., Mansion House, London, E. C.

"Which said contract was on the 5th day of March, 1886, assigned by the said Kensington & Co. to the said William Sturges, and as to what pay, if any, said Sturges was to receive from said syndicate, or the members thereof, for his services and expenses in connection with said contract or acts done thereunder, and also as to what interest, if any, said Bessie McLeod Sturges has or had in the said contract or in the remuneration, if any, which the said syndicate was or may be found liable to pay to the said William Sturges in connection therewith.

"*Second*—As to the liability, if any, of the said Capitol Freehold Land and Investment Company (hereinafter re-

ferred to as the Capitol Company) to the said Sturges for services rendered by said Sturges in or about the promotion and organization of said company, or rendered to said company since the date of its organization, or in or about the selling of the debentures of said Capitol Company, or in or about its business, and what claim, if any, said Sturges has to any shares of stock of said Capitol Company.

*“Third—*How much, if anything, is due and owing to said William Sturges from the said syndicate, or any member thereof, for services performed or expenses incurred for said syndicate or for said Capitol Company in or about the promotion and organization of said Capitol Company, or in or about the sale of its debentures, or in or about the business of said Capitol Company, from the commencement of the year 1884 down to the present time, and also what sum of money or other consideration, if any, was due and owing to said William Sturges for services performed during said last mentioned period for the said syndicate in efforts to sell lands for said syndicate, or to raise money by mortgage upon certain lands owned by said syndicate under a certain contract for the building of a State House for the State of Texas, and for services on behalf of said syndicate in connection with the promotion and organization of said Capitol Company, the selling of its debentures and attending to the interests of said syndicate in connection with said Capitol Company, and for attending to the interests of said company and said syndicate in any other way or manner during said period, or for any services rendered or expenses incurred in any way or manner by the said Sturges for the said syndicate from the year 1883 down to the present time.

*“Fourth—*What sum of money, if any, is due upon a certain alleged loan of \$140,000 made by the said John V. Farwell to the said William Sturges, for which said Sturges gave his note dated June 24, 1889, payable in one year, with six per cent per annum interest, secured by

collaterals, with power of sale, and collateral securities, being 6136 shares of stock in the said Capitol Company and seven shares of stock of the Sonora Land Company.

*"Fifth—*As to who is the owner and entitled to a certain sum of \$18,000 deposited with John V. Farwell & Co., or to the credit of said John V. Farwell, which were part of the proceeds of a certain sale made by one Travers of certain property known as a part of the Grace Furnace property, and as to how said sum of money should be applied in the accounting among the parties hereto; also, as to the amount paid said William Sturges, or to others for him, from time to time, upon account of his said claim for services in money, stocks or a transfer of property, real or personal, to, for or on behalf or at the request of said Sturges.

*"Sixth—*As to whether certain eighty lots in Smith Moore's addition to the city of Marquette, State of Michigan, belonged to the said Bessie McLeod Sturges or to the said John V. Farwell, or to any other or others of the parties hereto, and as to what claims or equities said John V. Farwell has against said property by reason of the payment of taxes or otherwise.

*"Seventh—*As to the rights and equities existing between the said syndicate and the said William Sturges, and as between the respective parties to this submission, growing out of the said mentioned services of said William Sturges and said fifty per cent Kensington contract, and a certain rebate agreement connected therewith and growing out of certain arbitration agreements made between said Sturges and said syndicate, or some members thereof, in regard to the said mentioned services of the said Sturges and his claims as to the said contract of the Kensington Company, which was assigned to him as hereinbefore mentioned.

*"Eighth—*And all matters in controversy between the parties to said agreements of submission, and their rights

and equities, respectively, in the matters hereinafter, concerning which there are any findings or adjudications.

"The court finds the substantial facts which are necessary to be set out in this decree to be as follows: That in 1883 John V. Farwell, Charles B. Farwell and Abner Taylor, known as the 'Syndicate,' were the owners of a certain contract with the State of Texas, whereby, in consideration of 3,000,000 acres of land to be deeded to them or their assigns by the said State of Texas, from time to time, as the work progressed, they agreed to erect a State House or capitol building for said State, according to certain plans and specifications; that in 1883 some efforts were made by the syndicate to raise money for the erection of the State House by a sale of the lands, or by borrowing upon them as security in the United States, and that John V. Farwell, while in Europe, in that year made some efforts in the same direction in England, but that all said efforts during said year were failures. Said syndicate commenced work upon the foundation of said State House with money furnished by the syndicate itself, and the evidence tends to prove that by May 1, 1884, the syndicate had expended several hundred thousand dollars in the work, and was very anxious to raise the money necessary for its further prosecution, either by the sale of the land or by borrowing upon the same."

The decree then recites the facts of the undertaking by William Sturges to promote the scheme of raising money in England by borrowing upon bonds to be issued upon security of the land, or shares of stock in a company to be formed, or by sale of such lands or shares of stock; of the various steps taken; of the final success of the scheme; of certain indebtedness of Sturges to plaintiff in error of upwards of \$100,000; of the loan by the latter to the former, aside from said indebtedness, of \$140,000, secured by note and by certain stocks as collateral; of the one-quarter interest acquired by said Sturges in certain contracts which were afterward assigned by third par-

ties to Sturges for the benefit of the syndicate; of the agreement that after all said first mentioned indebtedness of said Sturges to plaintiff in error should be paid out of the said interest of Sturges the balance was to go to his wife, the said Bessie McLeod Sturges. The decree contains a further extensive finding of facts which it is not thought necessary to set out here, but which may be found set out in full in *Farwell v. Sturges*, 58 Ill. App. 462. But the decree found that said one-quarter interest of said Sturges was worth, over and above said first mentioned indebtedness, \$75,000, and that the said syndicate should account for and pay to said Bessie McLeod Sturges, who was the owner thereof, the said sum of \$75,000; that said William Sturges had rendered other services, and was entitled therefor, and for other matters stated, to a large sum, amounting to \$110,590.43, which should be applied as a credit upon said note of \$140,000, and that the balance of \$29,409.57 should be paid by said William Sturges, and in default that the stocks pledged as collateral, and which, subject to such pledge, belonged to Bessie McLeod Sturges, should be sold to pay the same; that said eighty lots in Marquette, Michigan, belonged to said Mrs. Sturges and not to plaintiff in error, and that upon payment by her to plaintiff in error of \$3995.62, which he had expended for taxes, with five per cent interest thereon, he should convey said lots to her. It was further ordered that execution or other process usual to courts of chancery issue to enforce the decree upon motion, if found necessary, and that each party pay his own costs.

Defendants in error have suggested in this court a diminution of the record, and have presented and asked leave to file a further record, which it is claimed was omitted from the transcript filed by plaintiff in error. This transcript, omitting the *placita*, which shows proceedings before the same judge at the February term, 1894, is as follows:

"Be it remembered, that at the term aforesaid, to-wit, on the 9th day of March, A. D. 1894, the following among other proceedings were had and entered of record in said court, to-wit:

"WILLIAM STURGES *et al.* }
v. } *Stipulation and submission.*
JOHN V. FARWELL *et al.* }

"On reading the stipulation filed herein, it is ordered that the said stipulation and agreement of submission of certain matters in controversy between said parties to Hon. Murray F. Tuley, one of the judges of the circuit court of Cook county, for his determination without a jury, and from which said determination there shall be no appeal, be spread at large upon the records of this court; and it is further ordered that the hearing of said matters be and hereby is set for Wednesday, April 4, 1894, and that cause shall then be tried without further delay.

"In the matter of the submission of the differences between William Sturges and Bessie McLeod Sturges, his wife, of the one part, and John V. Farwell, C. B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment Company, (Limited,) of the other part.—*Stipulation of submission.*—Before Hon. Murray F. Tuley.

"It is hereby stipulated and agreed that the accompanying paper be filed as the stipulation and agreement between the parties, and that the hearing may be set for Wednesday, the 4th day of April, 1894, and that the cause shall then be tried without further delay.

GEORGE F. WESTOVER,

*For John V. Farwell, C. B. Farwell, Abner Taylor and
Capitol Freehold Land and Investment Co.*

HENRY S. MUNROE,

Solicitor for Wm. Sturges and Bessie McLeod Sturges.

"*Stipulation of submission.*—*In the circuit court of Cook county,
State of Illinois.*

"*First*—We, John V. Farwell, C. B. Farwell, Abner Taylor and the Capitol Freehold Land and Investment

Company, (Limited,) of the one part, and William Sturges and Bessie McLeod Sturges of the other part, do hereby agree to submit to Judge Murray F. Tuley, of said court, certain matters in controversy between us, for his determination, without a jury, he to hear the same within such reasonable time as may be proper and necessary for the separate parties hereto to be prepared for such hearing, and to enter the judgment or decree of the court therein within a reasonable time after such hearing shall be concluded; that the matters submitted herein shall include all matters of difference whatsoever between the parties of the one part, or either of them, and the parties of the other part, or either of them, excepting only the matters at issue between the said Bessie McLeod Sturges and the said John V. Farwell in a certain cause pending in the United States Circuit Court for the Northern District of Illinois. All other suits or proceedings, of every name and nature, between the parties of the one part, or either of them, or the parties of the other part, or either of them, shall be dismissed, discontinued and withdrawn, without prejudice to the rights of any party hereto.

"Second—That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

"Third—That no record, except of this agreement and of such judgment or decree, shall be made as to the matters in controversy so submitted or to the proceedings had on the hearing thereof.

"Fourth—That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

"Fifth—That we, each to the others, hereby waive all rights of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted and in the entering up of the judgment or decree therein, and agree that this release of

errors may be plead in bar of any writ of error that may be issued out as to such judgment or decree.

"Witness our hands and seals this 23d day of May, 1892.

JOHN V. FARWELL,	[Seal.]
C. B. FARWELL,	[Seal.]
ABNER TAYLOR,	[Seal.]
THE CAPITOL FREEHOLD LAND	
AND INVESTMENT COMPANY,	[Seal.]
WILLIAM STURGES,	[Seal.]
BESSIE McLEOD STURGES,	[Seal.]
MORAN, KRAUS & MAYER, AND	
MUNROE & THORNTON,	

Solicitors for Defendants in Error."

The statute under which the proceedings were had in the circuit court is as follows:

"An act to enable parties to avoid delay in the administration of justice.—Approved June 17, 1887.—In force July 1, 1887.

"Sec. 1. That any two or more persons or corporations may appear, in person or by attorney, in any circuit court, (or in the Superior Court of Cook county,) and submit to any judge thereof, orally and without formal pleadings, any matter in controversy, having first entered into a written agreement (to be entered of record) and substantially in the following form, to-wit:

"*In the Circuit Court of County:*

"*First*—We (here insert names) do hereby mutually agree to submit to Judge (here insert name), of said court, certain matters in controversy between us for his determination, without a jury, he to hear the same forthwith, and to enter the judgment or decree of the court therein within (here insert number of days or 'forthwith') days after such hearing is concluded.

"*Second*—That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

"*Third*—That no record, except of this agreement and of such judgment or decree, shall be made as to the matters in controversy so submitted, or as to the proceedings had on the hearing thereof.

"*Fourth*—That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

"*Fifth*—That we, each to the other, hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted and in the entering up of the judgment or the decree therein, and agree that this release of errors may be plead in bar of any writ of error that may be sued out as to such judgment or decree.

"Witness our hands and seals this.....day of.....
A. D.....[Seal.]
.....[Seal.]"

"Such agreement shall be signed by the parties in person or by duly authorized attorney in fact, and when so executed shall be of binding force upon the parties thereto in all the courts of this State.

"Sec. 2. It shall be the duty of such judge to proceed and in a summary manner to hear and determine the matters so submitted, and he shall enter a judgment or decree therein within the time fixed in said agreement, which said judgment or decree shall be final and conclusive and may be enforced in like manner as other judgments or decrees of such court, but no appeal shall be allowed therefrom."

TENNEY, McCONNELL & COFFEEN, (S. P. SHOPE, of counsel,) for plaintiff in error.

MONROE & THORNTON, and MORAN, KRAUS & MAYER, for defendant in error Bessie McLeod Sturges.

JAMES H. WILKERSON, administrator, *pro se*.

Mr. JUSTICE CARTER delivered the opinion of the court:

It was shown on the suggestion of a diminution of the record and motion for leave to file the additional record, the decision of which was reserved to the final hearing, that the cause in the circuit court mentioned in such additional record and the cause mentioned in the first transcript filed as a return to the writ of error were one and

the same, though it cannot be so determined from the certificates of the clerk. No attempt is made by plaintiff in error to disprove the showing made that the cause mentioned in the additional record, and of which it is in part a transcript, is the same cause in which the final decree was rendered, except that by his affidavit and others it is denied that the statutory agreement recited in the additional record was executed by any of the parties whose names appear signed thereto, except William Sturges. It is also denied by the Farwells that they authorized any such signing, or that they knew of the existence of said agreement, or the record thereof, until after the final decree. It is manifest that we cannot in this proceeding and on affidavits try the question as to whether the parties did or did not execute some original paper writing of which a record has been made in the cause in the court below. The only questions on this motion are, Was any part of the record omitted in the first transcript? And, Is the additional record certified to us such omitted part? We are satisfied that both of these questions must be answered in the affirmative, and that the additional record should be filed as a part of the record in said cause. It will be so ordered. *Schirmer v. People*, 33 Ill. 276; *Goodrich v. Cook*, 81 id. 41.

The record contains inherent evidence that the proceedings certified in the two transcripts were all had in the same cause. There is identity of names of parties and of the matters to be submitted as recited in the record. The supplemental record shows that the agreement of submission transcribed in it was presented to Judge Tuley in the circuit court on March 9, 1894, at the February term, by the attorneys and solicitors of the respective parties, and that upon their written stipulation filed in the cause the following order of court was then entered of record: "On reading the stipulation filed herein, it is ordered that the said stipulation and agreement of submission of certain matters in controversy between said

parties to Hon. Murray F. Tuley, one of the judges of the circuit court of Cook county, for his determination without a jury, and from which said determination there shall be no appeal, be spread at large upon the records of this court; and it is further ordered that the hearing of said matters be and hereby is set for Wednesday, April 4, 1894, and that cause shall then be tried without further delay." It is urged, however, that the final decree recited that the cause came on to be heard upon the agreements of submission which are copied in it, and which, as will be noted from the statement of the case, are not identical with but are different in some respects from the agreement of submission contained in the supplemental or additional record, and that the decree itself shows that the hearing was had, not upon the last mentioned agreement, but upon the two recited in the decree.

There is some room for doubt as to the meaning of the decree on this subject, but we do not regard it as inconsistent with the position that the agreement mentioned in the supplemental record, which upon its face conformed, in every respect, to the statute, and which, when the cause was set by the court for a hearing, (and without which there was no cause,) was presented to the court and ordered spread upon the records, was the agreement upon which the judge relied as conferring, in connection with the appearance of the parties, jurisdiction to hear and determine the matter in dispute,—otherwise why order it to be entered of record as the statute requires? Otherwise why did the attorneys for the respective parties, omitting none, so stipulate and so represent to the court? Otherwise why did the trial take place in pursuance of this order so made? If the court or the parties did not regard this as the agreement under which the proceedings were being carried on, or if, for any reason, it was determined to disregard it and to proceed under other agreements, we would expect to find some record of such change of purpose, and not to find the court pro-

ceeding to hear a case of so complicated and important a character as to occupy its time and attention for many weeks, without any record whatever showing that there was any cause pending. The agreements recited in the decree had not been filed or entered of record, and were only finally recorded as a part of the decree. It may well be that after the final decree was rendered, and, as a part thereof, the agreements of submission had been entered of record, the statute requiring such entry of record was sufficiently complied with; but this view does not lessen the force of the argument that the trial judge would not be expected to proceed with the trial until the statutory agreement, which should precede or accompany the oral submission, had been entered of record, and that it would require something more than the expressions in the decree relied upon by counsel to lead to the conclusion that he did so.

The substance of the contention of plaintiff in error now is, when stated in plain language, that the trial judge was deceived and imposed upon, not by the parties, but by the counsel then representing them; that the agreement which was presented to him in court as one of the judges thereof, by counsel for all the parties, including plaintiff in error, as their agreement selecting him to hear and determine their controversies and to render a final judgment or decree under the statute which could not be reversed on error or appeal, and which he ordered to be spread upon the records of the court and upon which he set the cause for hearing, was not the agreement of the parties at all, nor of any of them except William Sturges; that although the names of all the parties, with seals attached, appeared thereto as if signed by themselves, such signatures were so affixed by unauthorized persons and without their knowledge; that although they afterward appeared in person in court in the cause before the same judge, with their counsel, (the same counsel who presented the agreement and caused it to be

entered of record,) as provided by the order when the agreement was so presented, and by their said counsel made an oral submission of the matters in controversy without the formality of written pleadings, as the statute provides, and induced the trial judge to hear and determine the same, and although this agreement was then of record in the same court and cause, as their counsel then well knew, they did not personally know of it, nor of any but the two agreements recited in the decree, and that therefore they, the several parties, are not bound by it, and that, unless jurisdiction was conferred by the agreements recited in the decree, the trial court had no authority to enter the decree and it must be reversed. That plaintiff in error is estopped from denying the execution and binding force of the agreement mentioned in the supplemental record, after he and all the parties, as well as the court, have so acted upon it, would seem too plain for argument. Whether his counsel had authority to execute and present to the court for him that agreement or not, and whether or not he knew of its existence and entry of record, the knowledge of his counsel was his knowledge, and he ratified, approved and confirmed it by acting under it and by appearing and inducing the court and the other parties to rely upon it, and he cannot now be heard here to dispute its binding force.

While the statute provides that no record of the matters in controversy shall be made except of the agreement and of the judgment or decree, it does not require the agreement to be set out or recited in the judgment or decree, and no inference can be drawn that the trial judge did not proceed under this agreement because he did not set it out in the decree. The substance of the two agreements which are recited is the same as that of the agreement mentioned in the supplemental record, but as Bessie McLeod Sturges did not sign the first of the two agreements and as the one she did sign was not under seal and it was executed, not by plaintiff in error person-

ally or by his attorney in fact, but only by his attorney, and the other parties to the record were not parties to it, it is contended that these agreements did not authorize the decree in favor of Bessie McLeod Sturges against plaintiff in error and the other members of the syndicate. When read and considered together, however, the plain intention appears to have been to make Mrs. Sturges one of the parties to the proceedings as outlined by the first of the two agreements. It may well have been because of the imperfection of these agreements, in view of the statutory requirements, that the more formal and complete agreement set out in the supplemental record was prepared and presented to the trial judge and entered upon the records of the court. We cannot upon the record before us, if we could under any circumstances, suppose, with counsel now representing plaintiff in error, that the learned judge of the trial court was engaged in trying certain controversies between Bessie McLeod Sturges and the plaintiff in error under one agreement, and certain other controversies between William Sturges and plaintiff in error and his associates under the other agreement, as separate causes, and that he then, ignoring all distinctions as to parties, entered a decree in favor of Mrs. Sturges, not against her adversary, but against parties to the other cause who had submitted for hearing no controversies with her.

There are many different points of view from which the case may be regarded, but they all lead to the same conclusion. If there be any doubt whether the decree was authorized by the two agreements recited in it, the construction placed upon the proceedings by the parties themselves was in harmony with the provisions of the agreement as set out in the supplemental record, and if that instrument were regarded only as making clear the construction put by the parties and the court upon the other two recited in the decree, the result would be the same,—to sustain the decree.

Question is raised as to the nature of the proceeding. Counsel insist that it is an arbitration, and that the award cannot stand unless the provisions of the statute are strictly complied with. The proceeding is not an arbitration, but is a proceeding in a court of general jurisdiction, before a judge thereof selected by the parties. By the ancient common law all pleadings were oral, and we see no reason why the parties may not, under the statute in question, without converting the trial judge into a mere arbitrator, waive the issuing of process and the formalities of written pleadings and trial by jury, and by agreement appear in a circuit court before a judge thereof selected by them, and under an agreement to be entered of record, as provided, make an oral submission of their controversies to such judge and be bound by the judgment or decree which shall be entered, releasing all errors and waiving the right of appeal. The statute requires the proceedings to be had in the circuit court or in the Superior Court of Cook county, and a judgment or decree to be entered which "may be enforced in like manner as other judgments or decrees of such court." The statute evidently contemplates that the proceeding shall be a proceeding in court, and one at law or in chancery, according to its nature.

It is next contended by plaintiff in error that defendant Bessie McLeod Sturges cannot avail herself of the agreement of submission releasing all errors, because she has not set the same up by plea in this court. It is, in effect, argued, that while the statute expressly provides that no appeal shall be allowed, it is provided only in the form of the agreement that by such agreement all errors that may intervene may be released, and that such release may be pleaded in bar of the writ of error. This contention is not altogether without force. The right of appeal exists only by statute, but a writ of error is a writ of right in common law cases, and the right to prosecute a writ of error in cases submitted under this statute is

recognized by the statute; and it would seem that the statute contemplates that the agreement releasing errors should be pleaded in bar. But this is a question of pleading, only. If the release of errors did not appear from the record itself made in the circuit court, it would, of course, be necessary to plead such release in this court, but as the agreement contains a release of errors and was made a part of the record below there would seem to be no necessity for a plea of a release of errors in this court. Upon the case as made by plaintiff in error upon the whole record it appears that he released all errors intervening in the court below, and the questions are presented by the record itself without being brought to our attention by plea. (*Austin v. Bainter*, 40 Ill. 82.) The joinder in error upon the record as it stands operates as a demurrer, and the court determines, as a question of law, from the record itself, that the errors alleged to appear therein are by the same record shown to have been released. It is, of course, true, that if the court did not have jurisdiction to render the decree no recital in the record that plaintiff in error had released all errors would avail. But we are of the opinion that jurisdiction was acquired and that the decree is conclusive. It will therefore be affirmed.

Decree affirmed.

CHARLES B. FARWELL

v.

BESSIE MCLEOD STURGES *et al.*

Filed at Ottawa November 9, 1896 — Rehearing denied March 6, 1897.

The opinion in the case of *Farwell v. Sturges*, (*ante*, p. 252,) is referred to for a discussion and decision of the question of jurisdiction here involved.

Farwell v. Sturges, 58 Ill. App. 462, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

TENNEY, McCONNELL & COFFEEN, (S. P. SHOPE, of counsel,) for appellant.

MONROE & THORNTON, and MORAN, KRAUS & MAYER, for appellees.

Per CURIAM: This is an appeal from the judgment of the Appellate Court affirming a decree rendered in the circuit court of Cook county by the Hon. Murray F. Tuley, one of the judges of that court, in a proceeding wherein certain matters in controversy between appellant and others were submitted to said judge for decision under the act of the General Assembly entitled "An act to enable parties to avoid delay in the administration of justice," in force July 1, 1887. (Hurd's Stat. 1895, p. 1169.) As the decree involved, so far as the appellant is concerned, only the payment of money, he took his appeal to the Appellate Court, but the decree is the same as in *Farwell v. Sturges*, (*ante*, p. 252,) which was by writ of error brought directly to this court, the title to real estate claimed by John V. Farwell being involved.

As the only question necessary to be considered is one of jurisdiction below to render the decree, and as that question is considered and disposed of in the other case, reference may be had to the opinion therein filed for the grounds of affirmance. For the reasons there stated the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

EDWARD ROBY

v.

THE CALUMET AND CHICAGO CANAL AND DOCK CO. *et al.**Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.*

1. **RES JUDICATA**—*matters properly involved are determined though not raised in original suit.* A judgment or decree is conclusive between the parties and those in privity with them, not only as to what was ostensibly determined thereby, but also as to those matters properly involved which might have been raised and determined.

2. **SAME**—*party to final affirmed decree is bound thereby.* After the Supreme Court has decided a chancery case and settled the equities, one of the parties cannot bring the former proceedings before the court for a second adjudication on cross-bill, nor can such proceeding be re-litigated by the parties under an original bill except for fraud or collusion.

3. **PRACTICE**—*power of trial court when case is remanded with directions.* Where the Supreme Court determines the merits of a case, and remands it with directions as to the judgment or decree to be entered, the trial court cannot re-try the cause, allow amendments or the filing of other papers, or do anything not in conformity to the remanding order.

4. **PLEADING**—*a bill seeking to litigate matters already res judicata is obnoxious to demurrer.* A bill filed by a party to a former suit which shows on its face that it seeks a re-litigation of matters already *res judicata*, and which contains no averment of fraud or collusion in the former suit, is demurrable.

5. **REDEMPTION**—*party failing to redeem within time decreed is forever barred.* The time within which redemption must be made under a decree rests in the sound discretion of the court, and if a party neglects to redeem within the time allowed him by the decree his right is forever barred.

6. **SAME**—*purchase of "new right" will not revive barred right to redeem.* A purchase *lis pendens*, by a party whose right to redeem lands is barred, of a certificate of sale, on execution, of the interest of another party to the lands whose redemption right is also barred, does not revive the former party's right to redeem, although he obtains the certificate from an innocent purchaser at the execution sale.

APPEAL from the Superior Court of Cook county; the Hon. W. G. EWING, Judge, presiding.

165	277
83a	340
165	277
208	1189
109a	1602

EDWARD ROBY, *pro se*:

The assignee of the equity of redemption may redeem although the equity has been abandoned for a considerable time. Coote on Mortgages, (4th ed.) 1076.

The hearing and decree may be had and entered on the original bill at one time and entered on the cross-bill at a later term. *Beauchamp v. Putnam*, 34 Ill. 381; *Davis v. Christian Union*, 100 id. 318.

The equity of redemption can only be barred by a valid execution of the power. 2 Jones on Mortgages, 1769.

COHRS & GREEN, for appellee the Calumet and Chicago Canal and Dock Company.

OSBORN & LYNDE, for appellees C. R. Cummings and O. S. Gaither.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The case of *Bremer v. Calumet and Chicago Canal and Dock Co.* was before this court at the September term, 1887, and is reported in 123 Ill. 104. The same case was again before this court at the March term, 1888, and is reported under the same title in 127 Ill. 464. The record in the case was again before this court in *Roby v. Calumet and Chicago Canal and Dock Co.* and is reported in 137 Ill. 289. We will not here repeat the facts shown in the case as stated in those opinions.

When the case was before this court as reported in 127 Ill. 464, the decree was reversed, and remanded with directions. The error assigned in the appeal in the case as reported in 137 Ill. 289, was, that the court refused to amend and modify its decree to conform to the mandate issued under the judgment as entered in the opinion as reported in 127 Ill., and the judgment of this court entered under that assignment of error was to remand the cause, with directions to conform its decree to the man-

date of this court on the former appeal. After the cause was remanded this appellant, on January 30, 1892, filed his bill in the Superior Court of Cook county, alleging that on March 10, 1874, defendant, the Calumet and Chicago Canal and Dock Company, being the owner of all the west half of the north-west quarter of section 17, township 37, range 15, in Cook county, Illinois, sold and conveyed the same to Charles G. Harris, by deed bearing date on that day, for \$40,000, which deed was recorded in book 381, page 442; that \$10,000 was paid in cash at the date of said purchase; that said Harris executed and delivered to said company his three promissory notes, payable to it or order, bearing date March 12, 1874, and bearing interest at the rate of ten per cent per annum after due until paid; that the said notes were for \$10,000 each, and payable, respectively, on or before the 12th days of March in the years 1875, 1876 and 1877, at the office of said company, in Chicago, and were given for part of the purchase price of said land; that said notes did not bear interest until the maturity or coming due thereof, respectively; that to secure the payment of said notes said Harris signed and sealed a certain trust deed purporting to convey all said land to George W. Smith, to have and to hold the same in trust; that in case of default in the payment of said promissory notes or interest, or either, or any part thereof, or in case of a breach of any of the agreements in said trust deed mentioned, then, on the application of the legal holder or holders of said notes, or either of them, the trustee was to enter into and upon the said premises, or any part thereof, and to receive all rents, issues and profits thereof, and, with or without such entry, to sell and dispose of said premises or any part thereof, either *en masse* or in separate parcels, as he should prefer, together with all the right, title, benefit or equity of redemption of the said Harris, his heirs or assigns therein, at the court house door, for the best price the same would bring in cash, ten days'

notice of such sale having been first given in one of the newspapers at that time published in the said city of Chicago, thirty days before the day fixed for such sale, and to make, execute and deliver to the purchaser or purchasers at such sale the deed or deeds for the premises sold, and out of the proceeds of such sale, after first paying all costs of advertising and sale, commissions and all expenses of said trust, and all moneys advanced for taxes, assessments or liens on said premises, with interest thereon at ten per cent per annum, to pay the amount of principal and interest which should appear by said promissory note or notes to be unpaid at the time of such sale, rendering the overplus, if any, unto said Harris, his legal representatives or assigns, on reasonable request; that the trust deed was recorded May 28, 1874, in book 387, page 147; that said trust deed gave to the said Smith no power to sell said land, or any part thereof, except upon the application of the legal holder or holders of the said notes, and upon the notice and the place prescribed, as above stated, and then only for payment of said enumerated expenses of said trust, and the amount of principal and interest which should appear by said promissory notes to be unpaid at the time of such sale; that the legal title to said premises so conveyed to said Harris, as aforesaid, was held by said Harris in trust for orator and Charles W. Colehour, as equal tenants in common; that orator paid the said \$10,000 of said purchase money which was paid in cash, and also paid to said company \$500 on the 12th day of March, 1874, which ought to have been applied, and afterwards was on the 28th day of June, 1886, by said company applied, on the principal of said deferred payments; that afterwards, during the month of April, 1874, the said three promissory notes in said trust deed described were by said Calumet and Chicago Canal and Dock Company surrendered to said Harris, to be by him destroyed, and the same were canceled and destroyed by the joint action and full

consent of both said Calumet and Chicago Canal and Dock Company and said Harris; that in lieu thereof said Harris made, executed and delivered to said company his three promissory notes, each being for the sum of \$10,000 of principal, and bearing date March 12, 1874, and bearing interest from date to the maturity thereof, at the rate of eight per cent per annum, payable annually, and after the maturity thereof at ten per cent per annum until paid; that said notes were made payable, respectively, on or before the 12th days of March in the years 1875, 1876 and 1877, to the said Calumet and Chicago Canal and Dock Company, at its office in Chicago; that the last mentioned notes were not mentioned in or described by said trust deed to the said George W. Smith, but, on the contrary, one of the last mentioned notes due on the 12th day of March, 1875, was a promise to pay the sum of \$10,800 on that day, whereas the note described in said trust deed due on said 12th day of March, 1875, was a promise to pay \$10,000 on that day, and no more; that said note due on March 12, 1876, (which was made in lieu of the note maturing at that date and described in said trust deed,) was a promise to pay \$800 on March 12, 1875, and \$10,800 on March 12, 1876, (in all \$11,600,) whereas the note described in said trust deed due on said March 12, 1876, was only a promise to pay \$10,000 on that day, and no more; that said note due on March 12, 1877, (which was made in lieu of the note maturing at that date and described in said trust deed,) was a promise to pay \$800 on March 12, 1875, \$800 on March 12, 1876, and \$10,800 on March 12, 1877, (in all \$12,400,) whereas the note described in said trust deed due on said March 12, 1877, was only a promise to pay \$10,000 on that day, and no more; that said trust deed, after describing the notes first given in the words following, to-wit: "Three certain promissory notes bearing even date herewith, executed by said Charles G. Harris and made payable to the Calumet and Chicago Canal and Dock Company or order, with interest at

ten per cent per annum after due until paid, as follows, to-wit: Said notes being for \$10,000 each, and payable, respectively, on or before the 12th days of March in the years 1875, 1876 and 1877, at the office of said corporation in Chicago, said notes being given in part payment of the purchase money for the real estate hereinafter described; and whereas, the said Charles G. Harris is desirous of securing not only the prompt payment of said promissory notes, but also of effectually securing and indemnifying the said Calumet and Chicago Canal and Dock Company for or on account of any assignment, endorsement or guaranty of the same,"—proceeded with the words of conveyance of the land upon the express trusts above stated and afterwards continued in the clause following, referring to said promissory notes bearing no interest until after due, and no others, to-wit: "And it is stipulated and agreed that in case of default in the payment of said promissory note or notes, or either of them, or of the interest thereon as aforesaid, or any part thereof, or of a breach in any of the covenants and agreements herein mentioned, then and in that case the whole principal sum hereby secured and the interest to the time of sale shall, at the option of the legal holder or holders of said promissory notes, without notice thereof to said party of the first part, his heirs, assigns or legal representatives, become at once due and payable, and the premises hereby conveyed may be sold in like manner and with the same effect as if the said indebtedness had matured in course;" that though said Calumet and Chicago Canal and Dock Company may have retained a vendor's lien on said premises, and though said deed of the legal title to said Smith showing on its face that it was given to secure payment of part of the purchase price of the above described premises might properly estop orator and said Colehour and said Harris, and all claiming under them or either of them, from denying that the notes given in lieu of those described in said trust deed, and for \$1800

more than those described in said trust deed, were not intended to be described in and secured by said deed of trust, still, because they were not in fact described in said deed, said Smith had, in fact, no power to sell said land on the application of the holders of them, they being other and different notes and for larger amounts than those described in such deed, because of the provisions of the chapter of the Revised Statutes of the State of Illinois entitled "Frauds and Perjuries," and especially the section thereof which provides that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of no effect;" that by survey and plat acknowledged by said Harris October 16, 1875, and approved by the board of trustees of the village of Hyde Park on October 30, 1875, and recorded on November 26, 1875, in the office of the recorder of deeds, said west half of the north-west quarter of said section 17 was subdivided into blocks and lots, with streets, alleys, etc., as shown by said plat, said subdivision being called Ironworkers' subdivision, and the blocks into which the said land was subdivided being numbered consecutively from 46 to 61, inclusive; that by deed dated November 6, 1875, and recorded November 26, 1875, said Harris conveyed to William H. Colehour all said west half of said north-west quarter of said section 17, containing eighty acres of land, and thereunder said William H. Colehour took the legal title of the said land upon trust, as to one undivided half thereof, in favor of orator, as said Harris had held the same; that by deed dated November 16, 1875, and recorded January 27, 1876, William H. Colehour conveyed unto Jacob Bremer lots 1 and 2 of block 47, and lots 41 and 42 of block 48, in the said subdivision, for the consideration of \$870, as is hereinafter more fully stated; that said Wil-

liam H. Colehour also conveyed divers other lots in said subdivision, as is hereafter stated; that afterwards, pretending to act under the powers in said trust deed purported to be granted to him in trust, on April 25, 1876, said George W. Smith pretended to sell all said west half of the north-west quarter of section 17, township 37, range 15, to the Calumet and Chicago Canal and Dock Company for the sum of \$30,000, under and pursuant to a notice published twenty-five times from and after the 27th day of March, 1876, and not otherwise; that said Smith conveyed to said company the legal title in him vested, by his deed executed and delivered to said company, bearing date April 25, 1876, and recorded May 17, 1876, by which deed and the record thereof it distinctly appeared that said Smith had not pursued the power apparently given in the trust deed to him, and that the pretended sale by him to said company, and the conveyance of the legal title to said company in and by said deed shown, had not operated to bar or foreclose the equity of redemption of the said Harris and his assigns, and those claiming under or through them, or either of them, but that the said title so vested in said company was held by it in mortgage only and as security for the payment of the said debt of said Harris, and was and would remain subject to redemption until foreclosed in chancery, or by some other process provided by law; that said trustee's deed, and the record thereof, showed that said trustee had not given the notice required in the trust deed through which he claimed to derive his power in trust, and which he referred to and described in said trustee's deed; that afterwards, by deed bearing date August 22, 1876, said Calumet and Chicago Canal and Dock Company conveyed and quit-claimed unto Joseph H. Brown, Samuel Hale, Joseph T. Torrence, George W. Hale, Charles B. Hale, Richard Brown, and the heirs and executors of Richard Bonnell, deceased, all interest in the west half of the north-west quarter of section 17.

The bill then sets forth the pleadings, decrees, etc., in the case of the Calumet and Chicago Canal and Dock Company against Jacob Bremer, and the several opinions, judgments and mandates of this court filed and entered when the case was before us as reported in 123, 127 and 137 Ill.; avers a right to redeem, and that appellee had made many conveyances, by reason of which there were new parties in interest, and that by such sales of real estate appellee had received large sums of money, etc.; avers a new interest, as follows: "Orator shows that at the September term, 1878, of this court one Oliver H. Horton recovered a decree and judgment against said William H. Colehour and Charles W. Colehour for \$4113.58; that execution was duly issued to the sheriff of Cook county thereon on October 4, 1878, who duly received the same on that day and duly returned the same on January 2, 1879, no part satisfied; that on July 9, 1885, a *pluries* writ of execution was duly issued on said judgment or decree to said sheriff of Cook county, on which said sheriff duly sold all the right, title and interest of the said defendants, William H. Colehour and Charles W. Colehour, in and to said west half of the north-west quarter of section 17, township 37, north, range 15, east, in Cook county, on August 4, 1885, to one Parker R. Mason for \$1550.17, and duly issued to him a certificate of sale thereof; that afterwards, on August 11, 1885, said Mason, by endorsement on said sheriff's certificate of sale, for value received, sold, assigned, transferred and set over the said sheriff's certificate to one Gregory T. Van Meter, and on September 5, 1891, said Van Meter, by endorsement on said certificate, for value received, sold, conveyed, assigned, transferred and set over said sheriff's certificate of sale, and all right, title and interest therein and in and to the premises therein described, unto your orator, and afterwards orator delivered said sheriff's certificate to the sheriff of Cook county, who on the.....day of....., A. D. 1891, duly issued

to your orator the proper sheriff's deed thereon, whereby he conveyed unto your orator all the title, estate and interest of said William H. Colehour and Charles W. Colehour in and to said premises, which deed was duly recorded and is ready to be produced, and thereby your orator became vested with the right to all said eighty acres of land free and clear from all rights and claims of said William H. Colehour and Charles W. Colehour, or either of them. Your orator charges and insists that said Oliver H. Horton, plaintiff in said judgment, had no notice, other than by the records of said trust deed to said Smith, of the lien claimed thereunder by the said Calumet and Chicago Canal and Dock Company, and said purchaser at said judgment sale stood in the shoes of said plaintiff in said judgment, and was bound by the recorded notice of the lien of said company, to-wit, by the words of said recorded trust deed; and your orator, in the right of such judgment creditor and of said purchaser at said judgment sale, has the right to redeem said premises by paying the amount specified in said recorded trust deed to said Smith, which amount is \$4800 less than the amount found by said decree to be due upon the notes held by said company."

The bill prays for an accounting and a right to redeem, etc., and for the delivery of possession. To this bill a demurrer was interposed and sustained and the bill dismissed. From the decree dismissing the bill this appeal is prosecuted.

To the original bill filed by the Calumet and Chicago Canal and Dock Company against Jacob Bremer the defendant filed his answer and cross-bill, and to the cross-bill filed by the defendant, William H. Colehour and the complainant in that original bill were made parties defendant. To that cross-bill of Bremer the defendant filed answers and William H. Colehour filed his cross-bill, to which the complainant and defendant to the original bill, and Charles W. Colehour and Edward Roby, were made

defendants. By this cross-bill William H. Colehour alleged, among other matters, that on March 10, 1874, said company being the owner in fee of the west half of the north-west quarter of section 17, (eighty acres,) subject to a large mortgage and tax title, agreed with Roby to sell and convey said land to Harris for \$40,000,—one-fourth cash when clear title should be conveyed, and \$30,000 in notes of Harris, of \$10,000 each, due in one, two and three years, without interest before maturity but bearing interest after maturity at ten per cent; that the company, on March 16, 1874, signed and sealed its deed bearing date March 10, 1874, and Harris executed his three promissory notes, bearing date March 12, 1874, for \$10,000 each, payable to the company in one, two and three years from date, bearing no interest before maturity but bearing interest after maturity at the rate of ten per cent, and to secure the same executed a trust deed to George W. Smith, dated March 12, 1874, conveying said land, which trust deed was, about March 16, placed with the notes, all the papers to await the clearing up of the title, and Roby paid said company \$500 as an earnest on the same; that afterwards, on March 21, 1874, the tax title not having been removed, and the mortgage embracing this with other lands, amounting to a million dollars, not having been removed, the company, being desirous that the deferred payments should bear interest from the day of sale at the rate of eight per cent per annum, agreed to a different mortgage and different notes, and that there should be no power of sale, and that the lands should be subdivided and a charge fixed on each block and each lot released for \$50, and that agreement was carried out by the giving of a mortgage to A. S. Downs, secretary of the company, and new notes, those described in the trust deed to Smith being surrendered and canceled; that the down payment of \$10,000 was made by two notes of Harris, of \$5000 each, guaranteed by Charles W. Colehour and Edward Roby; that afterwards Charles W. Colehour and

Edward Roby paid said two notes, and by mistake the trust deed to Smith was put upon record while the real trust deed was kept by the company. The bill sets out the particulars of the real trust deed or mortgage to Downs containing no power of sale and providing for a specific amount (\$1875) to be secured upon each block and \$50 a lot in the subdivision and for release upon the payment of such sum, and the way the mistake was made in recording the other, and says that Charles W. Colehour and Roby were interested with Harris in the purchase. It also sets out the subdivision by Harris and his deed to William H. Colehour, and alleges that at the same time Charles W. Colehour assigned and released to William H. Colehour all his interest in the land for a valuable consideration, and that William H. laid out all streets, and had an auction, and sold and conveyed lots subject to \$50 each, with the approval of the company. It then sets out the pretended sale by Smith, and the notice and pretended conveyance to the canal and dock company for \$30,000, and says that the sale is invalid for want of publication of a notice according to the terms of said deed; alleges that the company was not at the time the holder of the notes described in said deed to George W. Smith, and that the sale and deed were invalid in various ways; sets out that a large number of the lots had been sold to different individuals, each of whom was entitled to redeem from said mortgage by the payment of \$50 per lot; that the plaintiff in the cross-bill, and those claiming under him, were in possession and had always been in possession of the property; alleges that on July 5, 1883, plaintiff conveyed to Charles W. Colehour certain lots therein mentioned, and on July 19, 1883, contracted to convey to him all the residue of the land.

The prayer of the cross-bill was to set aside the trustees' deed, and for an accounting and relief, etc. The cross-bill as amended, and making Roby a party, was filed January 15, 1885, and on the same day Edward Roby

answered, substantially admitting the allegations of the cross-bill to be true.

On the pleadings thus made an interlocutory decree was first entered on December 26, 1885, finding the rights of the parties and finding the right of redemption in Roby and others, and referring the cause to the master in chancery to take proof and state the amount due, etc. Subsequently, on June 28, 1886, the report of the master having been filed, a final decree was entered finding the amount due the Calumet and Chicago Canal and Dock Company was \$73,873.20. The decree concludes as follows: "And it is further ordered, adjudged and decreed, that unless the persons entitled to redeem said premises shall pay to the said Calumet and Chicago Canal and Dock Company the said sum of money last above mentioned, with the interest thereon, within ninety days from this date, according to the tenor and effect of the decree entered in this cause at the December term, A. D. 1885, of this court, then and thenceforth, from and after the expiration of said period of ninety days, the said persons, and each of them, shall be absolutely and forever barred of and from all right and equity of redemption of, in and to all and singular the premises in said decree mentioned and described."

A writ of error having been sued out from the Appellate Court for the First District, and an appeal to this court from the judgment there, such proceedings were had as resulted in the opinion in 123 Ill. Thereafter a writ of error was sued out of this court to reverse the decree of the Superior Court of Cook county, and the opinion in 127 Ill. was filed, where it was directed that "the decree in all respects is affirmed, except in so far as it assumes to give affirmative relief by directing Bremer to convey, or otherwise, and in that respect it is reversed and the cause remanded to the court below, with directions to that court to modify and amend the decree to conform to the views herein expressed."

When the mandate of this court was filed in the Superior Court a certain amendment of the decree was entered and decree made, and an appeal was taken from the decree so amended and the opinion in 137 Ill. was announced. By these two opinions it was held that that part of the decree which requires Bremer, in default of payment, to execute a deed to the Calumet and Chicago Canal and Dock Company was error, as was also so much of the decree as confirms the sale made by Smith, trustee, under the Harris trust deed, which bars and forecloses the equity of redemption of Edward Roby and others, and assumes to vest title in the canal and dock company in fee simple, free and clear of all right and claim, by way of equity of redemption or otherwise, of Bremer, the Colehours, Edward Roby, and those claiming under them or either of them, in and to the whole eighty-acre tract of land described, and estops them (Colehour, Bremer and Roby,) from setting up any claim, right, title or equity of redemption in said land. The decree was by these adjudications affirmed, except as to the affirmative relief thus granted.

Those parts of the decree which were affirmed, both the interlocutory and final decree, so far as necessary to consider in this opinion, are stated in the opinion in *Bremer v. Calumet and Chicago Canal and Dock Co.* 127 Ill. 464, where it was held the cross-bills were in effect bills to redeem, and under the prayer for general relief it was competent to grant a right to redeem, and the decree was quoted from as follows: "And the court further finds from the evidence, that in consequence of irregularities and defects in the notice and proceedings by the said George W. Smith, trustee as aforesaid, in making the sale under said deed of trust from the said Charles H. Harris to said Smith, as trustee, by virtue of the power of sale therein contained, the said Jacob Bremer, Charles W. Colehour, William H. Colehour and Edward Roby, or any or either of them, is entitled to have said sale of said

property described in said deed of trust set aside, upon such terms and within such time as may be prescribed by the court, upon paying to the Calumet and Chicago Canal and Dock Company the amount now due upon said promissory notes, including the interest thereon, as specified in said deed of trust, and upon paying to the said Calumet and Chicago Canal and Dock Company the amount paid by the said dock company for taxes upon said land, and interest thereon, as provided in the said deed of trust." And in that case the court further held: "An objection is urged that the decree should have provided for a statutory period of redemption. This is not tenable. The time rests in the sound discretion of the court, in view of all the circumstances. In such cases the complainant should be prepared to pay at once, and his bill, when properly framed, offers to make payment. The usual time allowed is six months, but that is not obligatory in all cases. We cannot say that the court here abused its discretion in that respect." By this opinion there was an affirmance of the decree by which the right of redemption was declared, the amount necessary to pay to redeem was found and the time within which the redemption was made was declared. By that affirmance and the order remanding, with directions as to entering the decree, the rights of the parties were adjudicated.

This bill is for an accounting and for a right to redeem. Whilst it is true Roby, the complainant in this bill, had no cross-bill filed, he was a party defendant to the cross-bill of Colehour, which was for redemption, etc., and which he answered and substantially admitted. The substantial cause of action in the Colehour cross-bill which the complainant in this bill admitted, and the substantial cause of action as stated in this bill, with the exception of what is averred as a new interest, are therefore the same.

A judgment or decree is conclusive between parties and their privies not only as to what is ostensibly de-

terminated, but of such other matters as were properly involved and might have been raised and determined. (*Hamilton v. Quimby*, 46 Ill. 90; *Ruegger v. Indianapolis and St. Louis Railroad Co.* 103 id. 449; *Rogers v. Higgins*, 57 id. 244; *Hawley v. Simons*, 102 id. 115.) The decree as entered allowed a redemption by the complainant, and the amount to be paid was found and the time within which to pay was stated, and to allow another bill to be filed, whether as a cross-bill in the original action or an original bill, would be a re-adjudication of the same subject matter.

The complainant urges that this is a cross-bill in the original action, and insists it was heard on demurrer at the same time that the decree was entered in that case under the mandate ordered when the case was reported in 137 Ill. When the decree was so entered under that mandate this complainant brought that cause again to this court at the same term that appeal was prosecuted, and by the opinion in that case reported as *Roby v. Calumet and Chicago Canal and Dock Co.* 154 Ill. 190, the decree was affirmed. This bill does not, on its face, purport to be a cross-bill. To hold it to be a cross-bill still from 1885 to the time of the original decree and the order of this court, as made and shown by the opinion in 127 Ill., this complainant should have asserted all the rights sought to be here asserted, except as to what is averred as a new interest. To allow this filed as a cross-bill would have been a disregard of the mandate of this court as made by that opinion. The law is, where a decree or judgment is entered, and on appeal to this court full consideration is given to the facts and judgment on which the decree is based, and the merits are fully discussed and settled, and the cause is remanded with directions as to the judgment or decree to be entered, there is no power in the inferior court to which the opinion or mandate is sent to re-try the cause or allow amendments or the filing of other papers, or do any other matter or thing not in conformity to the mandate of this court. The in-

ferior court must carry out the mandate of this court, and proceed that far and no farther. (*Washburn & Moen Manf. Co. v. Chicago Galvanized Wire Fence Co.* 119 Ill. 30; *Gage v. Bailey*, id. 539; *Buck v. Buck*, id. 613; *Newberry v. Blatchford*, 106 id. 584; *Wadhams v. Gay*, 88 id. 250, and authorities cited.) The rule is different, however, where there is a reversal and remandment without specific directions. When a case is considered by this court on appeal, and the merits of the case are determined and equities settled between the parties thereto, one of the defendants cannot, under the guise of a cross-bill, bring all the previous proceedings before the court and thus have the court reconsider questions already passed on. (*Cable v. Ellis*, 120 Ill. 136.) The bill as a cross-bill was therefore not good, and the demurrer was properly sustained thereto.

Neither can a party to such proceedings as were had in the bill originally filed by the Calumet and Chicago Canal and Dock Company against Bremer, and the cross-bills in the same case, have the proceedings re-litigated under an original bill, except for fraud or collusion. That is not averred in this bill, and as the bill set forth all the former proceedings, it appeared on its face that it was an attempt to re-adjudicate what was *res judicata*. As an original bill it was obnoxious to a demurrer.

We will briefly discuss the effect of the averment of "a new right," as alleged in the bill. On January 15, 1885, Roby became a party and filed his answer to the cross-bill of William H. Colehour, and from that time on he was an active participant in that litigation and cognizant of the proceedings. After the original bill was filed, and after the filing of Colehour's cross-bill and the filing of Roby's answer, the sale under execution was made and the certificate issued. In 1891 Roby acquired that certificate. No right could be acquired by that certificate, and the deed made thereunder, greater than Colehour had. By that part of the decree affirmed in 127 Ill.

the redemption by Colehour was required to be made within ninety days, in default of which it was barred, and, his right being barred, any right acquired during the pendency of the suit against him would fall when his right failed. His interest in the land was subject to the lien of the Calumet and Chicago Canal and Dock Company, as found by the court. But aside from this, Roby, by his answer to Colehour's cross-bill, set up the purchase by himself and Charles W. Colehour of the lands, and in his answer Roby admits that about November 6, 1875, said Harris conveyed to said William H. Colehour his interest in said lands, to be held in trust for himself and Charles W. Colehour, and the latter released his interest to William H. Colehour. The latter in his cross-bill sought to set aside the trustee's sale and deed. The decree, which found a right of redemption in William H. Colehour and Edward Roby and limited the time within which they could redeem, was determined before a deed was made on the certificate of sale to the latter, and when he took the certificate of sale and acquired his deed the status of both Colehour and Roby had been fixed and determined with reference to the right of redemption. His purchase of that "new right" was *lis pendens*, and he purchased with knowledge of the right of the canal and dock company, and that could not revive his claim which was already barred. The bill seeks to do this by reason of this new right claimed. The effect of the cross-bills was they were bills to redeem, and the rule is that the time within which the redemption must be made under a decree to redeem rests within the sound discretion of the court. If the complainant neglects to redeem within the time specified his right is forever barred. (2 Jones on Mortgages, sec. 1107.) The rule stated in the text was announced in the case in 127 Ill., and sustained as the rule in this State.

By the decree in 1886, which was finally affirmed in all these four appeals on all questions except as to the

affirmative relief to the Calumet and Chicago Canal and Dock Company, the question is, what was taken under the sale on execution of 1885, on which, by the assignment of the certificate, Edward Roby acquired a deed in 1891? It is to be regretted the date of the sheriff's deed is not stated in the bill, as it might determine whether it was made within five years after expiration of time of redemption. If by the pending proceedings Colehour's right was barred the sheriff's deed could convey no interest. The adjudication as to all parties and privies if this is a cross-bill, as insisted by the appellant, would bar relief even as to this acquired title which is set up as a new interest.

We are of the opinion there is no error in the decree dismissing this bill, and the decree is affirmed.

Decree affirmed.

ELLEN STANLEY *et al.*

v.

THE CHICAGO TRUST AND SAVINGS BANK.

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

165	295
90a	75
165	295
106a	184

1. **VARIANCE**—*difference between amount claimed on foreclosure of mortgage and amount found due is not a variance.* A complainant, on foreclosing a trust deed, is entitled to a decree for the amount due; and the fact that the proof shows that the indebtedness is less than the deed calls for, and is evidenced by other notes than those named therein, is not such a variance as defeats his right to recover what is actually due.

2. **USURY**—*the remitting of all interest eliminates question of usury.* The question whether a plaintiff has charged usurious interest on money loaned is eliminated from a suit on the note evidencing the indebtedness by the taking of judgment for the principal sum alone.

3. **SAME**—*pleading—facts constituting usury must be averred.* It is not sufficient, either at law or in equity, to plead in general terms that a transaction was usurious, but the facts relied upon as constituting usury must be set forth.

Stanley v. Chicago Trust and Sav. Bank, 61 Ill. App. 257, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This was a bill brought by the Chicago Trust and Savings Bank, a corporation, in the Superior Court of Cook county, to foreclose a trust deed given by Ellen Stanley and Philiskey E. Stanley, her husband, to the Title Guarantee and Trust Company, trustee. The trust deed bears date the 10th day of February, 1893, and purports to have been given to secure the payment of a principal note of the same date, executed by appellants, for the sum of \$10,000, with interest thereon at the rate of six per cent per annum, payable semi-annually, which interest was evidenced by four coupon interest notes of \$300 each, said principal note being payable, on or before two years after date thereof, to the order of the makers, and by them endorsed in blank.

The defendants, P. E. Stanley and Ellen Stanley, put in an answer to the bill, in which they admit they made the \$10,000 note named in the bill and the four coupon interest notes attached, but deny that the notes were given for value received; admit the giving of the trust deed to the Title Guarantee and Trust Company, conveying the premises in question; deny that said principal and interest notes were signed and transferred to the complainant for valuable consideration and are now held and owned by it, but aver that the same were owned by D. H. Tolman, president of said Chicago Trust and Savings Bank; that Tolman made said transaction individually; that the Chicago Trust and Savings Bank and D. H. Tolman were in fact and legal effect one and the same; that said transaction was originally tainted with usury, and that defendants were compelled to pay interest on said money as they received it under said original note of \$10,000, at the rate of five per cent per month; that

at the time of making said note for \$10,000 only the sum of \$5000 was thereby paid and intended to be paid and advanced on said note, and that from said \$5000 the sum of \$1200 was thereupon taken by said Tolman and applied by him on the payment of certain shares of capital stock of said Chicago Trust and Savings Bank, which stock said defendants were compelled to purchase at the rate and price of \$200 per share, its par value being \$100 and its actual value being nothing; that the necessities of defendants were such at the time of making the said \$10,000 note that they were compelled to submit to the dictates of said Tolman; that said stock in said Chicago Trust and Savings Bank has always been retained in possession of said Tolman or said bank, and has never been in possession of defendants, and they hereby repudiate said pretended purchase of stock; that upon a fair accounting, with interest on the advances at the rate of six per cent per annum, there is not due to said Tolman at this date, including principal and interest, more than \$3900, which sum defendants aver they are ready and willing to pay, and hereby offer and tender.

To the answer complainant filed a replication, and on the hearing on the pleadings and evidence the court entered a decree in favor of complainant for \$6105.67, which, on appeal, was affirmed in the Appellate Court.

JOHN S. BROWN, (OLIVER & MECARTNEY, of counsel,) for appellants.

ASHCRAFT, GORDON & COX, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The following grounds are relied on by appellants to reverse the judgment of the Appellate Court: First, the relief given is not in accordance with the prayer of the bill, and the proof and decree do not conform to the allegations of the bill; second, said \$10,000 note, the coupons thereto attached and the trust deed securing the same,

were given to the bank as collateral security for money borrowed from the bank by P. E. Stanley, and for no other purpose, and the decree should not have included any part of the notes given by Stanley for bank stock; third, the whole transaction between Stanley and the bank was usurious, and in no event should the decree have been for more than the amount of money actually loaned by the bank to Stanley, together with legal interest, less the \$1750 paid by Stanley to the bank. The points relied upon will be considered in the order made.

The bill alleges the execution of the \$10,000 note and the four coupon notes, and that to secure the payment thereof appellants, by deed of trust dated February 10, 1893, conveyed to the Title Guarantee and Trust Company certain real estate to secure the payment of the notes. It is also alleged that the complainant is the owner and holder of the notes, they having been assigned to it. The bill prays for an accounting, that Ellen and P. E. Stanley be decreed to pay complainant the sum found to be due, together with costs, taxes and solicitor's fees, and that the premises be sold to satisfy the amount due complainant. The bill also contains a prayer for general relief.

The proof showed that the \$10,000 note, and the coupon notes thereto attached, were transferred to the bank as collateral security to secure certain other notes executed by the defendants to the bank, and it is contended that the decree of foreclosure for the amount of these notes was not authorized by the allegations of the bill. We do not concur in that view. The bill was brought to foreclose the deed of trust given to secure the \$10,000 note and coupons. Complainant, as holder of the notes and deed of trust, was entitled to foreclose for whatever amount was due it on the deed of trust, and the fact that the proof showed that the indebtedness was less than the amount named in the deed of trust, and was evidenced by other notes, did not forbid a decree for the amount actu-

ally due on an accounting from the defendants to the complainant. If this deed of trust had been executed by a third party, and turned over by the defendants to the complainant as collateral security to secure a certain indebtedness due from defendants to complainant, the latter would have been entitled to foreclose against the third party for the full amount of the deed of trust, and the amount over and above its debt would have been held for the benefit of the pledgor. But here, as the collateral was against the pledgor, it was unnecessary to take a decree for any greater sum than the evidence showed was actually due from the defendants to complainant. We fully recognize the rule that the allegations of a bill and the proof must correspond; but there was no such departure from that rule here as to authorize a reversal of the decree.

As respects the second point made by appellants, that the \$10,000 note and coupons and trust deed were only turned over to secure money actually loaned to the defendants by the bank, appellants, as we understand the record, misapprehend the facts presented by the record. The note of October 26, given by defendants to the bank, after describing the \$10,000 note and trust deed, contains the following further provision: "It is further expressly understood and agreed that the above collateral is also put up and pledged as security for any other note or indebtedness which the holder hereof now has or may hereafter have against me." This provision is sufficiently broad to embrace the notes given for the stock as well as the note or notes given for money actually loaned. Moreover, the master in chancery expressly found, as appears from his report, that the deed of trust was transferred to complainant to secure the nine \$200 notes given for the bank stock.

The next question relied upon to reverse the decree is, that the transaction was tainted with usury. So far as the money actually borrowed is concerned, we are sat-

isfied that the defendants paid a greater rate of interest than is authorized by the statute. Upon this branch of the case the master in chancery reported as follows: "It appears, from the evidence, that while said \$10,000 note was given for that sum nominally, in fact the defendants Stanley did not receive that sum of money, but that about April 26, 1893, they received from the complainant \$4875 for the period of thirty days, and executed therefor a note for \$5000, due in thirty days; that about May 26, 1893, defendants Stanley, being unable to pay said \$4875 and interest, borrowed from said complainant the further sum of \$650 in cash and \$200 as a first payment on ten shares of the capital stock of complainant bank, making \$850 additional, which defendants Stanley agreed to pay in thirty days from that date, and also renewed the \$5000 note for thirty days, and gave for the \$850 so borrowed an additional note of \$1000; that on June 26, 1893, when said \$5000 note and \$1000 note became due, defendants were unable to pay the same, and gave a new note for \$6000 and paid the complainant \$150 in cash and took up their two notes previously given; that on July 26, 1893, when said \$6000 note became due, defendants Stanley renewed the same and paid complainant the further sum of \$150; that on August 26, 1893, when said note became due, said defendants Stanley, being unable to pay, again renewed the said note for thirty days and paid the further sum of \$150; that again, on September 26, 1893, when said \$6000 note became due, defendants Stanley renewed the same and again paid the sum of \$150 in cash; and again on October 26, 1893, when said \$6000 note became due, defendants Stanley were unable to pay the same, and renewed it for thirty days and paid the complainant \$150."

The master in chancery, in making his report, computed interest at six per cent on the amount of money actually received by the defendants and deducted all payments made, and to the balance he added the taxes which had been paid and the four notes remaining unpaid

which had been given for bank stock. But the decree was not rendered for this amount. Appellee deducted all interest on the money loaned and took a decree for \$6105.67,—the amount remaining after the exclusion of interest. This action on the part of the complainant eliminated the question of usury from the case. It appears, however, that when the first note given by the defendants for \$5000 became due, on May 26, they were not able to pay, and not only desired to renew the note, but also applied to borrow of the bank \$1000 additional. The bank refused to loan this additional sum unless the defendants would purchase ten shares of the bank stock. This the defendants agreed to do, and the purchase was made at \$200 per share. There was paid cash down \$200, and nine notes, for \$200 each, were executed for the balance of the purchase money, maturing at a future day. Four of these notes remained due and unpaid when the bill was filed, and the amount thereof was included in the decree. The sale of the bank stock may have been a shift or device resorted to by the bank to obtain usurious interest and conceal or cover up the usurious transaction, but we do not regard the evidence sufficient to establish that fact. But if it were sufficient, a fatal objection to the defense interposed is, the answer fails to set up facts showing wherein the usury consists, with that degree of certainty required by law. (*Mosier v. Norton*, 83 Ill. 519; *Goodwin v. Bishop*, 145 id. 421.) In the latter case it was held that it is not sufficient, at law or in chancery, to plead in general terms that the transaction was usurious. The facts constituting the usury must be set forth.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

JOHN I. SULLIVAN.

Filed at Ottawa January 19, 1897—Rehearing denied March 6, 1897.

1. TRIAL—*court should restrain improper arguments of counsel.* It is the duty of the trial judge to supervise the arguments of counsel to see that they are fairly made, and he should, either of his own motion or at the request of opposite counsel, restrain all improper remarks or lines of argument.

2. SAME—*counsel have a right to interrupt an opponent's argument to object to his statements.* Counsel have the right to interrupt an opponent's argument to object to statements which they consider improper, for the purpose of obtaining a ruling thereon.

3. APPEALS AND ERRORS—*exception must be taken to rulings to preserve them for review.* The action of the trial court in refusing to allow counsel to interrupt their opponent's argument for the purpose of interposing objections cannot be reviewed on appeal unless exception to its ruling is preserved.

4. SAME—*exceptions avail nothing unless taken to rulings.* Exceptions taken to opposite counsel's argument are not sufficient to raise any question for review when no rulings by the court are obtained, notwithstanding the court refused to allow interruptions for the purpose of objecting, saying that under its rules anything said by opposite counsel might be considered as having been excepted to.

West Chicago Street R. R. Co. v. Sullivan, 64 Ill. App. 628, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

SCANLAN & MASTERS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On February 4, 1892, appellee, then eight years old, was running across VanBuren street, at its intersection with Aberdeen street, in the city of Chicago, and came in

collision with a team of horses drawing one of appellant's street cars on VanBuren street. He was knocked down and lost an arm, and brought this suit to recover damages for his injuries, alleging that he was in the exercise of due care, and that the driver of the street car was negligent in failing to observe him and in driving at a rapid rate. He obtained a judgment, which was affirmed by the Appellate Court.

The greater part of the argument for appellant is devoted to a criticism of the reasons for affirming the judgment given by the Appellate Court in its opinion, but, as has been often said, the judgment of the Appellate Court cannot be reversed on account of the reasons given for the judgment; and if a consideration of what a jury might do upon another trial, in view of the financial condition of the parties to the suit, might be deemed an improper or insufficient reason for the judgment, it could not be reversed on that account. *Christy v. Stafford*, 123 Ill. 463; *Dunham Towing and Wrecking Co. v. Dandelin*, 143 id. 409; *Illinois Central Railroad Co. v. Harris*, 162 id. 200.

The facts have been conclusively settled by the judgment of affirmance in the Appellate Court, and there are but two alleged errors of law. The first complaint is, that the court permitted a witness for plaintiff to testify that there were other persons present at the time of the accident. The same proof was subsequently made by other witnesses on the part of plaintiff, without objection, and defendant itself proved the fact by a number of witnesses. The fact was not in controversy, but if the objection should be entertained there was no error in the admission of the evidence.

The second supposed error is, that there was improper argument on behalf of plaintiff. During the argument of plaintiff's counsel a question was raised as to the propriety of comments then being made. The judge stated that he would not permit interruptions of the argument, but that his rule was to permit either side to have the

record show that they had saved exceptions to every statement of counsel on the other side, and that anything said by counsel on either side might be considered as having been excepted to. This course was pursued in making up the bill of exceptions, and exceptions were inserted wherever defendant's counsel saw fit. These exceptions were not to any rule or action of the court, but only to what plaintiff's counsel did.

It is the right and duty of the judge to supervise the argument of counsel and see that it is fairly made, and his duty, as well as that of counsel, has been stated by this court in *Elgin, Joliet and Eastern Railroad Co. v. Fletcher*, 128 Ill. 619, as follows (p. 627): "A court hearing counsel, under pretense of arguing a case, making statements of matters to the jury not in evidence nor pertinent as illustrative of matters in evidence, should promptly stop the counsel, explain to the jury the impropriety of his language, and take such measures as shall be appropriate to prevent a repetition of such misconduct, and for a failure of duty in that respect, manifestly affecting the result, the judgment should be reversed. But the counsel whose client is unfavorably affected by such statements should call the attention of the court to them at the time, for it might be that, being preoccupied with other matters, they would otherwise escape his attention." The rule is thus stated in the *Encyclopedia of Pleading and Practice* (vol. 2, 750): "The presiding judge should, either by his own motion or upon request of the opposite counsel, check counsel in an improper line of argument, and preserve the dignity of the court by compelling obedience to its orders and rulings. It is the unquestionable right of counsel to interrupt an improper argument by opposing counsel for the purpose of stating his objections and moving the court to take proper action." It is true that, although the trial court may have ruled correctly on such objections and sought to counteract the effect of improper argument by rebuke and instructions, the opposite party

may be materially prejudiced, and the court should grant a new trial, or an appellate court reverse the judgment, where it appears that an injury has been done; yet there is nothing to be reviewed on appeal or writ of error unless an objection has been made and a ruling insisted upon at the time. *Elgin, Joliet and Eastern Railroad Co. v. Fletcher, supra; Holloway v. Johnson*, 129 Ill. 367; *Marder, Luse & Co. v. Leary*, 137 id. 319; *North Chicago Street Railway Co. v. Cotton*, 140 id. 486; *Scott v. People*, 141 id. 195; *Boone v. People*, 148 id. 440; *Pike v. City of Chicago*, 155 id. 656; 2 Ency. of Pl. and Pr. 755.

It was the right of defendant's counsel to interrupt and object to improper argument and to require the ruling of the court on their objection, but they did not see fit to insist upon that right. No exception was taken to the ruling that there should be no interruption. There was no ruling or action by the court concerning any part of the argument, and there is therefore nothing to be considered under the assignment of error that improper argument was indulged in.

The judgment will be affirmed.

Judgment affirmed.

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107a	* 88

DANIEL L. BOONE *et al.*

v.

CHARLES W. COLEHOUR *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. **LIMITATIONS**—*general rule for applying bar in equity.* Where there is concurrent jurisdiction between courts of equity and courts of law, the former will, as a general rule, refer to the Statute of Limitations, as applied in courts of law, to determine the period when the bar will be complete in equity.

2. **SAME**—*when note is barred at law its security will be barred in equity.* If, after a note secured by mortgage is barred by the Statute of Limitations, resort is had to equity to foreclose the mortgage, that

court will apply the bar to foreclosure proceedings, in the absence of a justifiable excuse for the delay.

3. *SAME—new promise to pay note must be in writing.* A default suffered by a defendant in a foreclosure suit, afterwards dismissed, cannot be relied upon in a subsequent suit to foreclose as removing the bar of the Statute of Limitations from the mortgage note, on the ground that the default raised an implied promise to pay the same, as the new promise must be in writing.

4. *LACHES—effect of unjust attempt at collecting debt.* The fact that the holders of a note secured by trust deed filed a cross-bill, before their note was barred at law, in proceedings to foreclose a former trust deed, seeking unjustly to have their trust deed foreclosed as a first lien, which cross-bill was subsequently dismissed, is not such an effort to collect the note as renders it inequitable to apply the bar of *laches* to a foreclosure proceeding begun by them after their note was barred at law.

Boone v. Colehour, 50 Ill. App. 664, affirmed. .

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the circuit court of Cook county dismissing an intervening petition of appellants, in the suit in equity of Charles W. Colehour against Edward Roby and William H. Colehour.

In the summer of 1871 a family by the name of Clarke, being the owners of certain lands in sections 8 and 17, in Hyde Park, in Cook county, sold the same to Charles W. Colehour, Francis M. Corby, Wesley Morrill and William Hansbrough for the round sum of \$100,000. The last named bought an undivided half, and Colehour and the others the other undivided half. The title was taken in the name of William H. Colehour for the benefit of the actual owners. There was a down payment of \$10,000. William H. Colehour executed notes and a trust deed to Voluntine C. Turner, as security for the deferred payments, to the extent of \$86,000, and an assumed prior incumbrance of \$4000. Shortly after the purchase Charles

W. Colehour bought out the interests of Corby and Morrill, and later, and on or about August 16, 1873, Hansbrough sold his half interest to Charles W. Colehour and Edward Roby. For part of the purchase price he received the note now in dispute, of William H. Colehour, for \$15,066.47, bearing date August 16, 1873, and payable in two years, secured by trust deed upon the land in section 17. Afterwards Hansbrough assigned these securities to the late Levi D. Boone. As the years passed the Colehours and Roby defaulted in payment of the Clarke debt. The Clarkes filed a bill in the circuit court of Cook county to foreclose, making the Colehours, Roby, Hansbrough, Dr. Boone and many others parties defendant. Boone died intestate during the pendency of this suit, and thereupon his administrators and heirs-at-law were made parties to the proceeding. They answered the bill to foreclose the Turner trust deed, and also filed a cross-bill in that case for the purpose of making this Boone mortgage a first lien,—a lien ahead of the Clarke mortgage,—setting up certain facts they claimed would establish that, and containing the following prayer: That the amount due on said note of William H. Colehour to William Hansbrough, and secured by said trust deed to Levi D. Boone, may be ascertained and established by decree of this court, and that the lien of said trust deed to said Boone securing the same may be determined and decreed to be a valid and first lien on all of said north three-quarters of the east fractional half of section 17, superior to the lien and claim of said Clarke and others, and said Turner, upon said land. Neither the Colehours nor Roby answered the cross-bill, and Roby took a default against the Colehours, but not against himself.

At the final hearing of the Clarke suit a decree was granted foreclosing the mortgage but dismissing the Boone cross-bill. While this decree dismissed the cross-bill generally, it will become apparent, as the court considers the whole case, that the dismissal was really

intended to be against the Clarkes alone. The Colehours, it will be seen, owed the mortgage debt and did not deny it, but the cross-bill, while it prayed for a foreclosure, was also aimed at the Clarkes, inasmuch as it sought a priority over their incumbrance, and the Clarkes were entitled to have it dismissed.

Upon appeal to the Appellate Court and to this court, respectively, the decree of the circuit court was affirmed. In the Appellate Court the affirmance was merely *pro forma*. This court held that a cross-bill was not necessary to preserve the rights of a second mortgage, but that such rights could be protected under the answer.

At the foreclosure sale, complainants, through their agent, Charles E. Speer, became the purchasers for the full amount of the decree, and there was no surplus remaining. Afterwards, in the present suit between the Colehours and Roby, the Title Guarantee and Trust Company was appointed receiver, and advanced sufficient to redeem from the foreclosure sale. It is now, under the decree of court, selling the redeemed real estate. After realizing sufficient to reimburse its advances and services and costs of court it is anticipated a large surplus will remain for distribution.

Soon after the redemption, and on July 17, 1891, appellants filed their intervening petition, seeking to establish the lien of their trust deed upon the proceeds of the sale of the land in section 17 when the same should be sold by the receiver, subject, however, to its advances for redemption, etc.

Samuel S. Boone, one of the parties to the original petition, having died, it became necessary to file a supplementary petition, which was done on July 7, 1892. To this William H. Colehour filed a plea of the Statute of Limitations. Charles W. Colehour filed a similar plea with an answer in support, and the Title Guarantee and Trust Company answered also, setting up the Statute of Limitations. Roby did not appear and was defaulted.

The pleas of the Colehours were allowed, and at the final hearing the court made a number of findings of fact, and also found that appellants' claim was barred by the Statute of Limitations, and that the trust deed in controversy was no longer a lien upon the land in question, and it thereupon dismissed the petition for want of equity.

The real question in this case is, whether the note and trust deed set forth in the petition are barred by the Statute of Limitations. The note secured by the trust deed matured August 16, 1875,—over fifteen years before the petition in this case was filed. It is not pretended that the Colehours, or either of them, have, within ten years before the filing of the petition, made any promise to pay the note. It is not even alleged that either has ever, in person, since the maturity of this note, recognized the debt secured by it.

There is no dispute about the facts found by the decree, but appellants contend that under the facts so found they are entitled to the relief sought by their petition. The decree finds that William H. Colehour executed and delivered the note and trust deed in suit, bearing date August 16, 1873; that the indebtedness was for purchase money of the land mentioned in the trust deed; that no payment was ever made upon the debt; that appellants are owners of the note and trust deed; that the Clarke suit was begun to foreclose their prior mortgage; that appellants, or those under whom they claim, appeared in due season in the Clarke foreclosure suit and answered, setting forth and exhibiting their rights and interests under said note and trust deed; that on June 5, 1885, before the expiration of ten years from the maturity of their note, appellants filed a cross-bill to foreclose the trust deed as against the Colehours; that the Colehours were defaulted for want of an answer thereto; that the cross-bill was afterwards dismissed, and that the dismissal was affirmed by the Appellate Court and this court, respectively. The language of these courts,

in their respective opinions, is set out in the decree, and appellants insist that it is manifest from this language that neither of said courts affirms the decree of dismissal of the cross-bill upon the merits of the issues raised, so far as the Colehours and Roby are concerned. The decree also finds that the litigation in the Clarke and Colehour foreclosure involved large and conflicting interests, and that a period of more than eight years elapsed from the filing of the original bill until the final disposition of the case by the Supreme Court. The Appellate Court affirmed this decree.

MONTGOMERY & MONTGOMERY, for appellants:

Mere lapse of time, however great, will not bar a recovery if an excuse therefor be given which takes hold upon the conscience of the chancellor, and is such as renders it inequitable that the bar should be interposed. *Harris v. McIntyre*, 118 Ill. 275.

Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction. 13 Am. & Eng. Ency. of Law, 674, note 5; *United States v. Alexander*, 19 Fed. Rep. 609; *Reynolds v. Sumner*, 126 Ill. 58; *Greenman v. Greenman*, 107 id. 404; *Pratt v. Pratt*, 91 U. S. 704; *Bond v. Hopkins*, 1 Sch. & Lef. 430; 2 Story's Eq. Jur. sec. 1521, *et seq.*, and notes; *Dunwiddie v. Self*, 145 Ill. 290.

A decree that the bill be taken as confessed is entered where the defendant, by not appearing within the time prescribed, is understood to admit the case made by the bill. 1 Black on Judgments, sec. 19, p. 19.

The admission of the due and unpaid debt was unqualified, hence the law implied a promise to pay it. Where the acknowledgment of the party is that the demand is still due and subsisting against him, this will be sufficient to infer a promise to pay. *Mellick v. Sealhorst*, Breese, 221.

A party who voluntarily permits a default to be taken, thereby impliedly admits that the demand is just and that he has no defense. *Lucas v. Spencer*, 27 Ill. 14.

A parol promise reviving a debt has the same effect as payment, under the statute. *Kallenbach v. Dickinson*, 100 Ill. 427.

MONROE & MCSHANE, for appellees Charles W. and William H. Colehour:

Equity courts, in cases of concurrent jurisdiction, usually consider themselves bound by the Statute of Limitations, which governs courts of law in like cases,—and this rather in obedience to the Statute of Limitations than by analogy. *Wagner v. Baird*, 7 How. 234; *Godden v. Kummell*, 99 U. S. 201.

To take a case out of the bar of the statute an express or clearly implied promise to pay must be made to the creditor or some one authorized to act for him. *Wachter v. Albee*, 80 Ill. 47.

In order to take a case out of the Statute of Limitations there must be a promise to pay the debt. It is not sufficient that the debtor admitted the account to be correct. *Quayle v. Guild*, 91 Ill. 385.

Under the statute now in force the new promise to take the note and mortgage out of the statute must be in writing. Limitation act, sec. 16.

JAMES E. MONROE, for appellee the Title Guarantee and Trust Company:

As to all mortgages, or trust deeds in the nature of mortgages, made since July 1, 1872, suit to foreclose the same must be brought within ten years after the right of foreclosure accrues, or it will be barred. Rev. Stat. chap. 85, sec. 11.

The existence of the debt is essential to the life of the mortgage given to secure it, and if the debt be barred by the Statute of Limitations the mortgage is gone and the

right to foreclose it in equity is barred. The mortgage debt is the principal thing, and the mortgage is only an incident to it. *Harris v. Mills*, 28 Ill. 44; *Pollock v. Maison*, 41 id. 516; *Emory v. Keighan*, 94 id. 543; *McMillan v. McCormick*, 117 id. 80.

Courts of equity, in suits brought to foreclose mortgages, do not act from analogy to the Statute of Limitations, but in direct obedience to its provisions. This is so in all cases where there is concurrent jurisdiction in law and equity. *Harris v. Mills*, 28 Ill. 44; *Quayle v. Guild*, 91 id. 378; *Manning v. Warren*, 17 id. 268; *Hancock v. Harper*, 86 id. 450; *Bonney v. Stoughton*, 122 id. 541.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On the 16th day of August, 1873, William H. Colehour executed his note for \$15,066.47 to William Hansbrough, due two years from date, with interest at six per cent per annum, which note became a chose in action of appellants, and to secure the same Colehour made a trust deed on certain lands, in which it was recited the land was incumbered by another deed of trust to secure a large sum of money, which latter deed was to one Turner. On a bill to foreclose this latter deed appellants were parties defendant and filed their answer and a cross-bill, by which they sought to have the deed of trust securing their note made a prior lien to the Turner deed of trust. They also asked the amount due on that note should be found. After an extended litigation a decree was entered foreclosing the Turner deed of trust and dismissing the cross-bill of appellants, which was affirmed by this court. (*Boone v. Clark*, 129 Ill. 466.) A sale having been made under that decree, such proceedings were subsequently had under a certain bill filed by Charles W. Colehour against Edward Roby and William H. Colehour that the Title Guarantee and Trust Company was appointed a receiver and advanced the money to pay the amount found to be

owing under the Turner foreclosure, and certain of the lands were platted and sold to pay the sum so advanced. At the time of the sale the lands were bid off for the amount of the decree but were redeemed by the receiver, and after selling enough to pay the amount advanced for redemption certain lands were still in possession of the receiver. After the dismissal of appellants' cross-bill they made no attempt to foreclose or protect their interests until the 17th of July, 1891, when they filed this intervening petition in the case of Colehour against Roby and Colehour. By this petition it is asked that the amount due upon this note shall be ascertained and the lien of the trust deed may be decreed, and the receiver, after paying the money advanced, etc., be ordered to sell other lots and pay the amount found due on their note. When this intervening petition was filed the note held by appellants had been due for fifteen years and eleven months. To this intervening petition William H. Colehour and Charles W. Colehour interposed pleas of the Statute of Limitations, which were held sufficient and a decree dismissing this bill was entered.

The contention of appellants is, that the history of this litigation, and the fact of their filing an answer and cross-bill in the litigation which resulted in the proceedings to foreclose the Turner mortgage, which cross-bill was dismissed by the court on hearing on July 17, 1886,—more than eleven years after the note became due,—show there was an active effort to collect this note, and hence that *laches* cannot be imputed to them; that in equity the conscience of the chancellor determines whether the bar shall be interposed, and to apply the bar in the present case would be inequitable. A further contention of appellants is, that to the cross-bill filed by them in the Turner foreclosure proceedings William H. Colehour and Charles W. Colehour were parties defendant and did not plead or answer, and their default was entered thereto, whereby an implied promise to pay this note resulted.

As to the first contention, it appears the object and purpose of the cross-bill filed by appellants in the Turner foreclosure were to have their mortgage made a prior mortgage, and that cross-bill was dismissed. Whilst the Statute of Limitations does not strictly apply in equity, yet courts of equity recognize the fact that such statutes are everywhere regarded as conducive and necessary to the peace and repose of society and are dictated by experience. In cases not within the statute the time within which a party will be barred from relief necessarily depends upon the facts and circumstances of each particular case, and cases exist where courts of equity apply the bar by reason of *laches* on the ground of public policy, where, even by analogy, the time fixed by the statute has not run. These cases must depend upon the peculiar facts of each case. The general rule, however, is, where there is concurrent jurisdiction between courts of equity and courts of law, the former will refer to the statute as a means of determining the period in which the bar will be complete in equity. As where a note is secured by mortgage the latter is incident to the debt, and, where a suit on the note would be barred at law by the Statute of Limitations, if resort is had to a court of equity to foreclose the mortgage that court will apply the bar of the statute to the proceeding to foreclose. In this case the bar of the statute is complete at law, and is equally so in this proceeding, by section 11 of chapter 83 of the Revised Statutes. (*Pollock v. Maison*, 41 Ill. 516; *Emory v. Keighan*, 88 id. 482.) There was not a mere effort at foreclosure of this mortgage in the cross-bill in the Turner case,—it was an attempt at securing a priority which was unjust and inequitable. Failing in that effort does not make a strong appeal to the conscience of the chancellor to avoid the bar of the statute as inequitable. Had the cross-bill been alone for a foreclosure of their trust deed, or had they, in their answer, sought a foreclosure, it is doubtless true that a decree would have been ordered.

Much stress is laid upon the language in the opinion in *Boone v. Clark*, *supra*, where it is said (p. 493): "If appellants desire they may, under their answer, move the court, and it will be the duty of the chancellor—and which may yet be done in this cause—to preserve their rights, as against Colehour, in any surplus remaining from the sale of the property after the payment of the amount due appellees." The court was speaking of the case then before the court, and not of a new and different proceeding. This intervening petition is filed in a different case from what the answer in the other case of which the court was speaking was filed. Appellants did not follow the method suggested then, but adopted a new procedure in another case. Appellants' first contention cannot be sustained.

To take a case out of the bar of the statute an express or clearly implied promise to pay must be made by the debtor to the creditor, or some one authorized to act for him. In *Carroll v. Forsyth*, 69 Ill. 127, the court says (p. 131): "The law as recognized by this court is, that to remove the bar of the Statute of Limitations it is incumbent on the plaintiff to prove an express promise to pay the money, or a conditional promise with a performance of the condition, or an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay. It must be of such a character as to clearly show a recognition of the debt and an intention to pay it,"—citing, as sustaining this case, *Parsons v. Northern Illinois Coal and Iron Co.* 38 Ill. 430, *Ayers v. Richards*, 12 id. 146, and *Norton v. Colby*, 52 id. 198. This language shows that the debt must not only be clearly recognized, but an intention to pay it must also be shown. This has always been the construction given to the Statute of Limitations in this State.

By the provisions of section 16 of the Limitation act of 1872, in force at the time of the execution of this note and since, the new promise necessary to remove the bar

of the statute as to written instruments must be in writing. Whilst a default entered against a defendant is as to that pleading a confession of its truth, it would not constitute a new promise in writing, as required by the statute. On no principle is a mere default a new promise in writing, and there is no pretense that any payment was made. The second contention of the appellants can not be sustained.

It was not error to dismiss the intervening petition, and the judgment of the Appellate Court affirming that decree is affirmed.

Judgment affirmed.

DAVID A. KOHN

v.

THE COLUMBIA NATIONAL BANK.

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

165 816
101a *878

1. APPEALS AND ERRORS—*when judgment of Appellate Court is final.* Where, in suits at law, no exceptions are preserved to the rulings of the trial court on evidence, and all propositions of law submitted by the appellant are held as law and none are submitted by the appellee, the only questions remaining are those of fact, which are conclusively settled by the finding of the Appellate Court.

2. JURISDICTION—*parties cannot confer jurisdiction on Supreme Court by stipulation.* Parties cannot, by stipulation, confer jurisdiction upon the Supreme Court to review a question of fact conclusively settled by the finding of the Appellate Court, nor can they, by stipulation, convert a question of fact into one of law.

Kohn v. Columbia Nat. Bank, 60 Ill. App. 304, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

MORAN, KRAUS & MAYER, and MONROE & THORNTON, for appellant.

DUNCAN & GILBERT, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of assumpsit, brought by David A. Kohn, appellant, against the Columbia National Bank of Chicago. The declaration contained three special counts and the common counts. The first special count was in substance as follows: That plaintiff loaned defendant \$25,000, and to secure the same defendant delivered him \$25,000 in Mecca bonds, and executed and delivered to him the following contract:

"THE COLUMBIA NAT. BANK, CHICAGO.

"CHICAGO, ILL., *January 8, 1892.*

"*Mr. D. A. Kohn, City:*

"MY DEAR SIR—If you will purchase \$25,000 of the first mortgage bonds of the Mecca Company at par, secured by a trust deed in the hands of the Illinois Trust and Savings Bank, said bonds drawing seven per cent interest from January 1, 1892, and due in ten years from date, we will agree to buy said bonds back from you at the same price you paid for same at any time you may so desire upon thirty (30) days' notice from you, allowing you the interest on said bonds from the 1st of January, 1892, until the date of our purchase from you, we reserving the right to purchase these bonds from you at any time by giving you ten (10) days' notice, provided you do not desire to keep them as a permanent investment; that is to say, if we have an opportunity to sell them permanently and you do not desire to keep them, and if you do not deliver said bonds to us within ten (10) days from the receipt of our notice of our desire to buy said bonds back from you, then this obligation to re-purchase the bonds from you shall be void.

"Yours, very truly,

Z. DWIGGINS, *Cashier.*

Accepted: D. A. KOHN."

That plaintiff demanded the repayment of said moneys in installments of \$5000, and interest every thirty days, and defendant paid the first installment and promised to pay the others, but failed so to do. The other counts were predicated on the contract, but it will not be necessary to set them out here.

The defendant pleaded the general issue, and by agreement a trial was had before the court without a jury, and upon the evidence introduced by the respective parties the court found the issues for the defendant. The plaintiff appealed to the Appellate Court, where the judgment was affirmed.

There was no ruling of the circuit court during the trial in regard to the admission or exclusion of evidence to which exception was taken and preserved by the appellant. The court held as law all the propositions which appellant requested, and no propositions were offered or held on behalf of appellee. The only question, therefore, which can come on this appeal is, whether, under the evidence introduced on the trial, appellant was entitled to recover, and that is a question of fact which cannot be considered here. The judgment of the Appellate Court affirming the judgment of the circuit court is conclusive upon all questions of controverted fact.

It appears, however, that at the close of the trial in the circuit court, and before the court rendered final judgment, the parties entered into an agreement, as follows: "Stipulated that upon appeal either party might, on this record, raise any and all questions and reasons for reversing the judgment herein, without any special findings of facts or conclusions of law." In the argument some importance is sought to be attached to the stipulation. The parties to a cause may conduct a trial by stipulation in such manner as they may determine, not inconsistent with the law or the rules of court; but they cannot, by stipulation, convert a question of fact into one of law, nor can they call upon this court to decide a question of fact which, under the statute, has been settled by the judgment of the Appellate Court.

As no questions of law have been raised for our consideration by the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WILLIAM J. MOORE

v.

GEORGE C. PRUSSING.

Filed at Ottawa November 23, 1896—Rehearing denied March 6, 1897.

1. PLEADING—*plea of failure of consideration must show the extent of defendant's damage.* A plea which attempts to set up as a defense to a note the plaintiff's non-compliance with the terms of the contract which was the consideration therefor is insufficient, where it contains no allegations by which the amount of damage resulting from such non-compliance can be determined.

2. SAME—*plea that sole makers of note signed as sureties is insufficient.* A plea by which the sole makers of a note attempt to set up as a defense that they signed as sureties and that the note was accepted as collateral security is obnoxious to demurrer, as to admit proof of those facts would be to vary the contract and contradict its terms by parol.

3. SAME—*when plea that note was delivered conditionally is insufficient.* Where the facts averred show that a note was executed and delivered for the consideration received, a plea is insufficient which attempts to change the terms of the instrument by averring parol conditions in conflict therewith.

4. EVIDENCE—*that note was delivered conditionally not admissible under the general issue.* Evidence that notes were delivered conditionally, under an agreement that they were not to become operative until certain other security had been exhausted, is not admissible under the general issue.

5. APPEALS AND ERRORS—*peremptory instruction for the plaintiff is proper when defense to note is inadmissible.* A court may instruct the jury to find for the plaintiff in a suit on a duly executed note, when the defense offered is not admissible under the general issue and demurrers to all special pleas have been properly sustained.

Moore v. Prussing, 62 Ill. App. 496, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

MOSES, PAM & KENNEDY, for appellant:

The plea of failure of consideration opened the door for the introduction of parol evidence. *Mann v. Smyser*,

76 Ill. 365; *Hill v. Enders*, 19 id. 163; *Morgan v. Fallenstein*, 27 id. 31; *Insurance Co. v. Rees*, 29 id. 272; *Gage v. Lewis*, 68 id. 604; *Ortel v. Schræder*, 48 id. 133.

Parties to negotiable paper have a right to show the capacity in which they signed such paper, and to prove the same by parol is not varying the terms of a written instrument. *Flynn v. Mudd*, 27 Ill. 323; *Ward v. Stout*, 32 id. 401; *Boynton v. Pierce*, 79 id. 145; *Camden v. McKoy*, 3 Scam. 437; *Brandt on Suretyship*, (2d ed.) sec. 29.

PRUSSING & McCULLOCH, for appellee:

A plea of failure of consideration which attempts to alter and contradict a written agreement by an oral, contemporaneous agreement is bad. *Penny v. Graves*, 12 Ill. 287; *Harlow v. Boswell*, 15 id. 56; *Walters v. Smith*, 23 id. 342; *Foy v. Blackstone*, 31 id. 538; *Harris v. Galbraith*, 43 id. 309; *Miller v. Wells*, 46 id. 46; *Weaver v. Fries*, 85 id. 356; *Walker v. Crawford*, 56 id. 445; *Mumford v. Tolman*, 54 Ill. App. 471; 157 Ill. 258.

Sole makers of a note cannot together, in a joint plea, attempt to set up a parol understanding or agreement making them only sureties. *Harris v. Galbraith*, 43 Ill. 309; *Miller v. Wells*, 46 id. 46; *Walker v. Crawford*, 56 id. 444; *Weaver v. Fries*, 85 id. 356.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The appeal in this case is prosecuted by the surviving defendant, William J. Moore, from the judgment of the Appellate Court affirming the judgment of the circuit court of Cook county upon a note for \$2500, dated December 8, 1893, made by appellant and James E. Moore. The principal questions arising upon this record grow out of the action of the trial court in sustaining a demurrer to the special pleas of the defendants. Numerous pleas were filed, which were amended at various times, and for the purpose of this opinion may be discussed as a plea of

failure of consideration, a plea that the note was executed as collateral security merely and was not to be binding, and a plea that the note was delivered conditionally.

By the plea of the failure of consideration defendants alleged that the Potomac Apartment Company, an Illinois corporation, was indebted in a large sum of money, to-wit, \$12,500, and for the purpose of paying this obligation that company applied, through its president, James E. Moore, to George C. Prussing for a loan; that Prussing was willing and consented to make the loan if defendants, James E. Moore and William J. Moore, would give their personal notes as security therefor; that the defendants agreed to execute and deliver to the plaintiff five notes as security for the indebtedness of the Potomac Apartment Company, on condition and in consideration only that said plaintiff would take from the company its building, together with leases, rents and profits accruing therefrom, and manage and operate the same honestly and faithfully, and would first look for the payment of the indebtedness owing to him, to the Potomac Apartment Company, and the security was accepted on that condition; that for the purpose of carrying into effect the agreement upon which the notes were made, the company turned over to the Illinois Trust and Savings Bank, as agent of the plaintiff, its building and the leases and income, and thereupon the defendants executed and delivered their notes in accordance with the agreement and upon the consideration stated; that the bank took charge of the building and managed and operated the same, but managed it so that instead of producing further income it resulted in loss, by reason of which mismanagement by the plaintiff, through its agent, the property failed to yield an income and discharge the obligations to plaintiff as agreed upon, whereby the conditions upon which the notes were made had failed. This plea is an attempt on the part of the defendants to set up the failure of plaintiff, through his agent, to comply with his contract,

whereby the consideration of the note for \$2500 here sued upon had failed. There is no averment in this plea of the amount of the income to be derived from the building if properly managed, nor is there any averment of the amount of loss sustained. At most, the plea of the defendants attempted to set up the damage sustained by failure to comply with the contract made by plaintiff, and nothing has been alleged in the plea by which the amount of the damage sustained by said non-compliance could be determined.

The second plea attempted to set up that the execution and delivery of the notes were as collateral security, merely, and set up substantially the same facts as pleaded in the plea of failure of consideration. Whilst a person signing a note has a right to prove by parol the capacity in which he signs the paper, and such proof is not an attempt to vary the terms of the written instrument, yet where the note is accepted as a separate and independent contract an attempt to vary the terms of the contract by parol is not admissible, and the plea attempting to set up that the note signed was accepted as collateral security could not change the legal effect of the instrument, as a liability would exist according to the terms of the contract, and the attempt to set up such an agreement constituted no defense. As the sole makers of the note, defendants cannot show they only signed as sureties. To permit proof of that fact would be to vary by parol the contract itself and contradict its terms. *Harris v. Galbraith*, 43 Ill. 309; *Miller v. Wells*, 46 id. 46.

The plea which attempted to set up that the note was delivered conditionally does not set up a contract by which it was to take effect on certain conditions, but attempts to set up substantially the same contract with reference to the bank that was sought to be set up under the plea of failure of consideration. While it may be shown by parol that the note was delivered conditionally, yet where the facts averred show execution of the note,

and its delivery for the consideration paid and received, an attempt to change the terms of the instrument by averring conditions in conflict with its terms is not a sufficient plea.

Fourteen special pleas, each of great length, were filed from time to time to the declaration in this case, to which demurrers were sustained. In what we have said we have attempted to group the averments of the several pleas, and when they are considered together it is an attempt to set up that the Potomac Apartment Company was largely indebted; that the defendant James Moore, desiring to raise a sum of money to pay that indebtedness, called on the plaintiff and sought to negotiate from him a loan of \$12,500; that to procure such loan the defendants executed their five promissory notes, and as further security to the payee the Potomac Apartment Company transferred its building, and the leases thereto, to the bank as trustee; that the bank and the company executed an instrument, in which it is recited that the company is in default in the payment of coupons in the sum of \$3750 upon its bond for \$125,000, secured by its trust deed to the bank, and is further indebted in the sum of \$12,500 and interest, evidenced by five notes of James E. Moore and William J. Moore, (which latter notes were held by Prussing;) that the company assigns and delivers to the bank all leases to the premises, and empowers the bank to collect rents, and to rent the premises in its discretion, in the name of the company or its own name, and to apply the proceeds and income, first, to the payment of its charges and expenses in that behalf, including attorney's fees; second, to the payment of costs of running the building, taxes, alterations and repairs; third, to the payment of ground rent; fourth, to the payment of coupons, with interest, and the coupons thereafter maturing; and fifth, to the payment of the five notes of \$2500 each.

These several pleas, which sought to set up this agreement and the duty arising thereunder on behalf of

plaintiff, brought before the court for construction that agreement. It appears the plaintiff was not a party thereto, and by the terms of the agreement he owed no duty and could exercise no power with reference to rents until there had come into the hands of the bank a sum more than sufficient to pay the indebtedness provided to be paid before any application of the rents should be made on his notes. We are of the opinion it was not error to sustain the demurrer to these pleas, as the matters sought to be set up outside of this written contract between the bank and the Potomac Apartment Company were all matters resting in parol.

On the trial the defendants offered testimony by which they sought to show the company was unable to pay its debts, and they gave notes to the amount of \$12,500, for which the plaintiff gave his check, which was deposited to another account and afterwards paid out as directed by one of the defendants, and the notes were made upon the condition that they were not to be operative or collectible until after the plaintiff had exhausted the security which had been given, which was the rent of the building, as provided for in the above mentioned agreement. This evidence would not be admissible under the general issue, and it was not error to exclude it.

The jury were instructed to find the issues for the plaintiff and assess the damages at the sum of \$2773.68. The defendants sought to set up this defense by the several special pleas to which demurrers were sustained. Not being admissible under the general issues, and there being no error in sustaining the demurrer to those pleas, it was not error for the court to peremptorily instruct the jury to find for the plaintiff the amount of the note, with interest.

We find no error in the record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

MINNIE D. PIPER.

Filed at Ottawa January 19, 1897—Rehearing denied March 6, 1897.

1. RAILROADS—passenger injured by mutual negligence of railroad companies may sue either. A passenger rightfully on a railway train, who, without negligence on his part, is injured by the mutual negligence of the servants of the company carrying him and the servants of a company with whom he has no contract, may maintain an action against either company.

2. RELEASE—mere dismissal of suit against one joint tortfeasor does not release others. Where a suit is pending against several joint tortfeasors, the dismissal of the suit against one will not bar the action against the others, in the absence of proof of release or accord and satisfaction.

West Chicago Street Railroad Co. v. Piper, 64 Ill. App. 605, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding.

• This is an action brought by Minnie D. Piper to recover damages for personal injuries alleged to have been sustained through the negligence of the West Chicago Street Railroad Company on the 26th day of May, 1891. At the time of the accident plaintiff was riding westward on Madison street in a public conveyance known as a "carette," operated by the Russell Street Carette Company. At the corner of Madison and LaSalle streets the carette collided with one of the defendant's cars, and the plaintiff sustained the injuries complained of. On a trial before a jury the plaintiff's damages were assessed at the sum of \$1100. The court entered judgment on the verdict, which, on appeal, was affirmed in the Appellate Court.

EGBERT JAMIESON, JOHN A. ROSE, and D. W. MUNN, for appellant.

165	325
82a	491
165	325
183	485
165	325
92a	1228
92a	1550
165	325
98a	1418
165	325
95a	1840
165	325
108	1210

HIRAM BLAISDELL, and JOHN F. WATERS, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Two grounds are relied upon by the West Chicago Street Railroad Company to reverse the judgment of the Appellate Court: First, it is claimed that the court erred in giving the plaintiff's first and second instructions; and second, the court erred in its rulings on the admission of evidence.

The instructions complained of in substance directed the jury, that if they find, from the evidence, that the plaintiff was riding in the carette at the time of such collision, and if the jury further believe, from the evidence, that such collision occurred by reason of the mutual negligence of the servants in charge of both the carette and of said car, then the plaintiff may recover from either of said companies, and the plaintiff, Minnie D. Piper, would not be charged with the negligence of the persons in charge of the carette, provided the jury further believe, from the evidence, that the plaintiff herself was, at and before the time of such collision, in the exercise of such care and caution as an ordinarily prudent person would have exercised under the same or similar circumstances.

The question presented by these instructions arose in *Wabash, St. Louis and Pacific Railway Co. v. Shacklet*, 105 Ill. 364, and it was there fully considered and the authorities bearing on the question cited and reviewed, and after a full consideration it was held, that where a passenger on a railway train is injured by the mutual negligence of the servants of the company on whose train he is rightfully traveling and of the servants of another company with whom he has no contract, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the carrier company on whose train he was traveling. That case is conclusive of the question raised, and as the

grounds upon which the decision of the question is predicated are fully stated in that case it will not be necessary to re-state them here.

In regard to the other question—the ruling of the court on the admission of evidence: It appears that Minnie D. Piper, the plaintiff in this case, some time after receiving the injury complained of, brought an action for damages against the Russell Street Cigarette Company and the West Chicago Street Railroad Company, and it was admitted on the trial of this cause in the suit so brought, that a judgment was rendered against the cigarette company by default and a dismissal taken against the West Chicago Street Railroad Company, one of the defendants therein; that the court afterwards, on application of the Russell Street Cigarette Company, set the default aside and re-opened the case, and the judgment was vacated; that when the case was called for trial, by mistake the plaintiff did not appear, and there was a judgment for the defendant, and on stipulation between counsel it was set aside and the case re-instated and then dismissed on plaintiff's motion, and the cigarette company paid \$100 to Mrs. Piper's attorney. For the purpose of meeting or explaining the facts in regard to the payment of \$100 to the plaintiff, the defendant called as a witness Willis G. Shockey, who testified as follows: "I am an attorney, and represented the American Employers' Liability Insurance Company last January and February. I was its adjuster. As such adjuster I had charge of the case of Minnie D. Piper against the Russell Street Cigarette Company. I had something to do with the case—not entire charge. I had something to do with the adjustment of the case with the plaintiff's attorney." The witness further testified: "The Russell Street Cigarette Company, through the insurance company, paid Mrs. Piper or her attorneys \$100." The witness was then asked what the money was paid for. This was objected to, on the ground that at the time the money was paid Minnie D. Piper

executed a written contract or stipulation of some kind showing the arrangement between the parties. The paper was then in New York, and could not at the time be produced on the trial. The court refused to allow the witness to state the contents of the writing, but allowed him to state what the money was paid for.

Of course, parol evidence is not admissible to prove the contents of a written agreement unless the agreement has been lost or destroyed and cannot be produced. But we do not regard the ruling of the court as such a departure from the established rule as to be ground for reversing the judgment. It was proper to show the payment of a sum of money, and we think it might also be shown what the money was paid for without infringing on the rule forbidding parol evidence of the contents of a written contract. Moreover, the evidence was not of a character to injure the defendant. As will be remembered, the defendant had proved that \$100 had been paid the plaintiff and she had dismissed the suit against the carette company. This did not constitute a defense to the action against the street railway company. A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. But where there is a suit pending against several tort feasors the dismissal of the suit against one will not bar the action against the others. (*City of Chicago v. Babcock*, 143 Ill. 358.) Here no release was established nor was there any evidence of an accord and satisfaction. It was not enough for the defendant to prove merely a dismissal of the suit against the other tort feasor, but in order to make the defense availing it was required to go further and show a release of the other tort feasor. As this was not done, the evidence admitted against defendant's objection could do it no harm.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HENRY F. SLATER, impleaded,

v.

RUTH GRUGER *et al.*165 329
e208 286

Filed at Ottawa January 19, 1897—Rehearing denied March 6, 1897.

1. JOINT TENANCY—*language of statute need not be used to create joint tenancy.* An estate in joint tenancy is created under section 5 of the Conveyance act, (Rev. Stat. 1874, p. 273,) when the instrument expressly declares that such estate is granted, although it contains no express declaration that an estate in common is not granted.

2. SAME—*what language used in a deed will create a joint tenancy.* A deed to the grantees "*and the survivor of them, in his or her own right,*" reciting that "the conveyance herein is made in joint tenancy," to have and to hold "unto said party of the second part, their heirs and assigns forever," creates an estate in joint tenancy.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

COPE, LEMMA & TRELOAR, for appellant:

It is not necessary that the language of the statute be employed to create a joint tenancy. *Mette v. Feltgen*, 148 Ill. 357.

It was not necessary, at common law, to employ express terms to create a joint tenancy. *Mette v. Feltgen*, 148 Ill. 364.

The intention of the parties, as the same is ascertained from the deed, governs. *Butterfield v. Smith*, 11 Ill. 485.

Words in a deed repugnant to the other parts of the deed will be rejected, when necessary to conform to the evident intent as gathered from the other parts of the instrument. *Flagg v. Evans*, 40 Vt. 16; *Carson v. McCaslin*, 60 Ind. 335; *James v. Balmer*, 20 Me. 425; *Watermain v. Andrews*, 14 R. 589.

JESSE COX, and WALTHER & LANAGHEN, for appellees:

The words in the description of the parties cannot control the force of the words in the granting part of the deed. *Boulos v. Ash*, 19 Ill. 187.

In the construction of a deed the question is, not what estate did the party intend to convey, but what did he pass by apt and proper words. *Johnson v. Bantock*, 38 Ill. 111; *Fowler v. Black*, 136 id. 363.

To create a joint tenancy the estate must be expressly declared to pass, not in tenancy in common, but in joint tenancy. *Mette v. Feltgen*, 148 Ill. 364.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The question in this case is, whether a deed executed October 12, 1882, by Johan Bender and Mary Bender, his wife, to Katharine Slater and Henry F. Slater, her husband, conveyed the premises therein described to the grantees as tenants in common or as joint tenants. The controversy arose under the bill of appellees filed in the Superior Court of Cook county, against appellants, for the partition of the land described in the deed and other lands about which there is no dispute. Appellees contended, and the Superior Court held, that the title was vested in Katharine Slater and Henry F. Slater, her husband, in fee simple, as tenants in common, and a decree for partition was entered in accordance with that conclusion.

The following are the only portions of the deed material to this question: The parties to it are first described as "Johan Bender and Mary Bender, his wife, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and Katharine Slater and Henry F. Slater, her husband, and the survivor of them, in his or her own right, of Chicago, in the county of Cook and State of Illinois, party of the second part." The granting clause is "unto said party of the second part, their heirs and assigns forever." After the description of the premises is the following: "The conveyance herein is made to said grantees in joint tenancy," and the *habendum*

is, "unto the said party of the second part, their heirs and assigns forever."

The quality of survivorship, which is not an incident of a tenancy in common but is the distinguishing feature of a joint tenancy, was mentioned in the description of the grantees as party of the second part, and immediately after the description of the premises it was declared that the conveyance was made to them in joint tenancy. The parties endeavored to create a joint tenancy, but it is insisted by appellees that they failed in that purpose by not complying with the requirements of the statute in their declaration as to the nature of the estate conveyed. The statute referred to is section 5 of an act concerning conveyances, (1 Starr & Curtis' Stat. 571,) which is as follows: "No estate in joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees, (unless otherwise expressly declared as aforesaid,) shall be deemed to be in tenancy in common."

The granting clause described the grantees by reference only, as "said party of the second part," previously defined in the deed. Appellees say that this must be taken to refer to the named parties, Katharine Slater and Henry F. Slater, her husband, and that the case of *Baulos v. Ash*, 19 Ill. 187, is conclusive on that question. They therefore insist that, taking said parties so named, their heirs and assigns, to be the grantees, and considering that no words indicating a joint tenancy were used in the granting clause, a tenancy in common in fee simple passed by that clause. In the case referred to it was held that the words in the description of the parties could not control the force of the words in the granting

part of the deed. In that case the further description was inconsistent with the granting clause, both in respect to the grantee and the nature of the estate vested. But an application here of the rule in that case does not aid appellees, because the words used in the granting clause of this deed are those proper to be used in creating an estate in joint tenancy, provided the deed also contains the declaration required by the statute. Prior to the existence of the statute, when estates in joint tenancy were favored, a conveyance to two persons, their heirs and assigns, would create an estate of that nature. (Williams on Real Prop. 134; 2 Blackstone's Com. 180.) If the granting clause had been to said Katharine Slater and Henry F. Slater, and the survivor of them, in his or her own right, the deed would have created a freehold estate in the grantees during their joint lives, with a contingent fee in remainder to the survivor. (*Mittel v. Karl*, 133 Ill. 65; 2 Blackstone's Com. 180, note 4.) The only change from the common law method of conveying the premises made by the statute is, that the deed shall declare that the premises pass, not in tenancy in common, but in joint tenancy. If that statute is sufficiently complied with there is nothing inconsistent with such an estate in the words employed in the granting clause. And for the same reason, a declaration that the premises are to pass in joint tenancy cannot be regarded as a limitation of the fee, such as was attempted in *Palmer v. Cook*, 159 Ill. 300. In that case, after granting a fee, the grantor attempted to provide that if either of the grantees should die without an heir her interest should revert to the survivor. That was an attempt to limit the estate over to another after the fee granted, while here the terms used in the grant would not convey an estate in tenancy in common if it were otherwise expressly declared in the deed.

But it is argued by appellees that no estate in joint tenancy can be created unless the language of the stat-

ute is used in the grant, and the premises are not only declared to pass in joint tenancy, but that they are not to pass in tenancy in common. It is urged that this deed is not sufficiently explicit in that regard. It is plain that joint tenancies are not favored by the legislature, and it was undoubtedly the object of the statute that the deed should clearly and explicitly show that the premises are not to pass in tenancy in common; but where that is the real intention, and it is made clear by the instrument, the particular phraseology used to show it cannot be important. The mere use of different terms, where it is clear that the parties understood the nature and incidents of the different estates, and where the language shows that the estate intended is clearly not a tenancy in common but a joint tenancy, should not defeat their purpose. The precise words employed in the statute were not used in the deed passed upon in *Mette v. Feltgen*, 148 Ill. 357. In that deed there was no declaration in terms that the premises should pass, not in tenancy in common, but in joint tenancy. The only language bearing on that question was the quit-claim to the grantees, "not as tenants in common, but as joint tenants." This was held to be a sufficient declaration. In this case the express declaration that the conveyance was made in joint tenancy, connected with the right of survivorship stated, which could not exist in the case of a tenancy in common, as completely negated the creation of an estate in tenancy in common as any words that could have been employed.

The decree will be reversed and the cause remanded, with directions to enter a decree in accordance with the views herein contained.

Reversed and remanded.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

CYRUS W. COLE.

Filed at Ottawa November 23, 1896—Rehearing denied March 6, 1897.

1. TRIAL—*improper discussion before jury of matters not elements of damage.* Remarks by plaintiff's counsel to the jury in a suit for damages for personal injury, which seek to lead the jury to infer that their verdict might include damages for future mental anguish which plaintiff might suffer from contemplating the remote possibility of a disease resulting from his injury, are improper.

2. SAME—*party desiring to take advantage of improper remarks of opposing counsel should object specifically.* Counsel desiring to take advantage of improper remarks of an opponent before the jury should object specifically to each remark, and preserve exceptions to the adverse rulings of the court upon such objections.

Illinois Central Railroad Co. v. Cole, 62 Ill. App. 480, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding.

This was an action on the case by appellee, against appellant, to recover damages alleged to have been sustained by him from personal injuries in a railroad collision on December 31, 1891. Appellee was a locomotive engineer in the service of the Michigan Central Railroad Company, and on the night in question was operating an engine pulling a number of cars loaded with express matter. His run was from Chicago to Michigan City, Indiana, and part of this distance was traversed by using the tracks of the appellant company. Near nine o'clock of the night mentioned, his engine collided with a freight train belonging to the appellant, near Pullman, Illinois. Appellee was running his train on schedule time, but in some manner the freight train belonging to the Illinois Central Railroad Company was pulled out from a side-track to the main track, thus, apparently without fault

of the appellee, causing the collision. Appellee, seeing the collision inevitable, reversed his engine and jumped, or made an attempt to leap, from his engine. After the collision he was found bruised and senseless, and knew nothing until he found himself on the operating table of a hospital. It was found he had sustained a severe scalp wound, his left hip and leg were bruised and he complained of injury in the back. After remaining six days in the hospital he was in a condition to be removed to his home in Michigan City. He did no work for four months, being most of that time under the care of a physician, but at the expiration of that time he again took up his duties as an engineer with the same company, performing the same, as appears, with the same satisfaction as before his injury. The case was not tried in the circuit court until the spring of 1895, and up to that time it appears from the evidence the injuries of appellee had not affected his earning capacity, and that his yearly wages averaged as much or more than before the accident. On the trial of the case, however, it was shown that about three weeks after his injury varicose veins developed on the left leg, from the knee down, necessitating the wearing of elastic stockings. By the evidence of appellee it was also shown that he had since that time been troubled with an affection of the bladder, and also constipation, all of which he testified he was free from before his accident.

On the trial of the case in the Superior Court of Cook county, and immediately after impaneling the jury, the appellant, by its counsel, tendered the sum of \$1000 to appellee in full of all damages, which was refused, whereupon the money was paid into the hands of the clerk of that court and the trial proceeded. Appellant thus admitted its negligence and liability, and the only question tried was as to the amount of damage sustained by appellee. The jury in the trial court returned a verdict for him of \$5000, on which judgment was rendered, and

on appeal to the Appellate Court for the First District this judgment was affirmed. From that judgment of affirmance this appeal is prosecuted to this court.

SIDNEY F. ANDREWS, (JAMES FENTRESS, of counsel,) for appellant.

CRATTY BROS., GRAY, MACLAREN, JARVIS & CLEVELAND, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

This case, as now presented in this court, is freed from most of the questions which might, if we were not precluded from a discussion of them, render the case quite difficult. One of the principal questions presented in the Appellate Court and most ably argued by counsel for appellant was that the verdict of the jury is excessive. This question has, however, by the Appellate Court been settled adversely to appellant, and we are bound by its finding. *Chicago and Eastern Railroad Co. v. Holland*, 122 Ill. 461; *Christian v. Irwin*, 125 id. 619; *New York, Chicago and St. Louis Railroad Co. v. Luebeck*, 157 id. 595.

The one question urged and argued by appellant in this court as a reason for the reversal of this judgment is, that the jury, under the instructions, when considered in the light of the argument made by appellee's counsel, were misled as to the proper measure of damages, and it is urged that under such misapprehension they included in their verdict the element of prospective mental anguish suffered by appellee by reason of anticipated danger or accident which might result in the future from varicose veins. It is not seriously urged that these instructions are in themselves erroneous, nor that they do not, in all respects, state correct propositions of law, but, rather, that on account of improper remarks in the argument of counsel for appellee the instructions, given immediately following his remarks, were misunderstood by the jury,

who followed the line of argument adopted, rather than the instructions. This question is earnestly presented by counsel for appellant, and we have given it careful consideration.

But two instructions were given by the court on behalf of appellee, and they are as follows:

1. "If you believe, from the evidence, that the plaintiff has sustained injuries on account of the negligence of the defendant, as set forth and claimed in his declaration, then the measure of his recovery is such damages as will compensate him for such injuries. The elements which may enter into such damages are the following: First, such sum as will compensate him for the expenses, if any, which he has paid in his efforts to effect his cure, and for his care and nursing during the period that he was disabled by the injuries, if the evidence shows that he was so disabled; second, the value of his time, as shown by the evidence, during the period that he was so disabled; third, if such injuries have impaired his power to earn money in the future, then such sum as will compensate him for such loss of power; fourth, such reasonable sum as you may award him on account of the pain and anguish, if any be shown, that he has suffered by reason of such injuries. The first and second of these elements are the subjects of direct proof, and are to be determined by you on the evidence. The third and fourth of these elements are from necessity left to your sound discretion, but your conclusion should be based upon all the facts and circumstances in evidence before you.

2. "If you find, from the evidence, that the plaintiff is entitled to recover as alleged in his declaration, then, in estimating the plaintiff's damages, you may take into consideration his health and physical condition prior to the injury and also his health and physical condition since then, if you believe, from the evidence, that his health and physical condition since then is impaired as the result of such injury; and you may also consider

whether or not he has been permanently injured, and to what extent, and also to what extent, if any, he has been injured or marred in his personal appearance, and to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injury, and also any necessary expenses he may have been put to in and about caring for and curing himself, and the value of any time you may believe, from the evidence, he has lost on account of such injuries, and you may consider what, if any, effect such injuries may have upon him in the future in respect to pain and suffering or respect to his power to earn money by his labor; and you should allow to him as damages such sum as, in the exercise of a sound discretion, you may believe, from all the facts and circumstances in evidence, will be a fair and just compensation to him for the injuries so sustained."

The remarks complained of by appellant were made by counsel for appellee in the closing argument of the case. In commenting upon the theory of his case that appellee had suffered a concussion of the spinal cord it was said: "That is the trouble with this man in those respects where there was a concussion of the spinal cord, —a shock to the marrow of the backbone, so that the nerves were affected that went to those organs—the organs that became affected and are affected still—have been affected steadily since 1891. They are affected now, so the doctor tells you. They are affected yet, and it is progressive—worse than it was and getting worse." And in commenting further upon the theory that the varicose veins on appellee's leg would continue to enlarge and that by any pricking or breaking of one he might bleed to death, counsel illustrated by a visit he had made to a leper hospital in the West Indies, in the following language: "They (the lepers) are generally from the poorer classes, and they did not realize the future that was for them. I thought while brother Andrews was talking, that if I were where Cole is to-day I would pray to be

given to me that insensibility that those poor people have, that were not conscious of their fate. Death,—certain death,—coming, eating and following and following until it struck a vital point, and then a while of pain and then the end.” And further in the argument counsel made the following additional remarks complained of: “The man who was a strong man before is a cripple now for life; and the anxiety that he must have about it,—the certainty, the probability if not the certainty, that they will get worse and some day bring him flat down,—is a matter for your consideration. He (Andrews) says a thousand dollars; but then he doesn’t take into consideration that idea—the mental anguish.”

These remarks of counsel are improper to the extent that they seek to have the jury infer that their verdict might include damages for future mental anguish which might be suffered by the plaintiff from a contemplation of what might occur. This is not the law nor is it a proper element of damage. (*Peoria Bridge Ass. v. Loomis*, 20 Ill. 236.) However, it does not appear from the record in this case that any specific objection was made by appellant to the particular remarks above quoted and on which error is assigned, nor any exception noted thereto at the time. Exception was taken to some other remarks of the same counsel, but those remarks were not material. While it is none the less the duty of the trial court to control counsel in argument before the jury without objection from opposing counsel, it is also the duty of counsel desiring to take advantage of such improper remarks to make specific objection, so that the trial court may have an opportunity to remove the evil effect, if any, from the minds of the jurors by proper instruction. If no such specific objection be made and exception preserved at the time it will not be considered in this court. *Elgin, Joliet and Eastern Railroad Co. v. Fletcher*, 128 Ill. 619.

No discussion of the two instructions given for the appellee is necessary. They in substance state correct

principles of law. We have no right to surmise that the jury disregarded these plain instructions of the court and based their verdict on the improper remarks of counsel in argument.

We find no reversible error in the record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

MICHAEL BAUERLE

v.

ANDREW LONG *et al.*

Filed at Ottawa November 23, 1896—Rehearing denied March 6, 1897.

1. PLEADING—*answering over waives error in overruling demurrer.* A defendant, by answering over after the court has overruled his general demurrer to a bill, thereby waives his right to assign such overruling as error.

2. PRACTICE—*in chancery—exceptions for insufficiency lie to unsworn answer when oath is waived.* The power of the court, under sections 23 and 24 of the Chancery act, (Rev. Stat. 1874, p. 201,) to require sufficient answers to all traversable allegations in the bill, and the right of complainant to except for insufficiency, extend to unsworn answers, when answer under oath is waived.

3. SAME—*on insufficient answer bill is taken as confessed as a whole.* Where, under section 24 of the Chancery act, a bill is taken as confessed for insufficient answer, the entire bill is so taken, and not merely that part to which the answer was insufficient.

4. SAME—*defendant cannot offer affirmative evidence before the master after bill is taken as confessed.* Upon taking a bill as confessed a court may enter a decree *pro confesso* or refer the cause to the master, and when so referred the defendant may appear and cross-examine complainant's witnesses, but cannot offer affirmative evidence.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

KRAFT, WILLIAMS & KRAFT, for appellant.

DOW, WALKER & WALKER, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The Pennsylvania Company for Insurance on Lives and Granting Annuities, a corporation organized and doing business under the laws of the State of Pennsylvania, and the appellees, were executors of the will of John H. Shoenberger. On August 14, 1890, they entered into a contract with the appellant, by which they, as executors, were to convey to appellant eighty acres of land in Cook county for the sum of \$240,000. The appellant paid them the sum of \$5000 as earnest money, and they were to submit an abstract of title to appellant for examination. Certain objections were made to the title by the appellant, and the executors filed a bill for specific performance. A demurrer thereto was sustained and the bill dismissed for want of equity. That decree was affirmed by this court. (See *Pennsylvania Co. for Insurance v. Bauerle*, 143 Ill. 459.) In that case it was said (p. 475): "The powers to sell and dispose of real estate and to execute deeds of conveyance therefor, and to convert the same into money, having been delegated by the will to the four appellants jointly, as executors, and they all having accepted the trust and qualified as executors, we think that a deed made by three, only, of the executors is not a good execution of the powers in the will, it appearing that the Pennsylvania company, the other trustee and executor, still survives as a going corporation, and that it has not resigned and been discharged from its office of trustee and executor, or been removed from its trust position by the order or decree of any competent court. Waiving the matter hereinafter considered, it would seem that in order to convey to appellee a good and valid title to the land here in question, the Pennsylvania company must either procure from the Auditor of Public Accounts a certificate of authority stating that it has complied with the requirements of the statute of this State, and then join with its co-executors in the ex-

ecution of a deed of conveyance, or else in some proper way shake off the trust and absolutely divest itself of the title, discretion and power that the will gives it in respect to the land situate in this State, thus leaving the co-executors in a position, as surviving executors, where they can lawfully act in the premises."

After that opinion was announced, the corporation, by certain proceedings before the Orphans Court of the county of Philadelphia, in the State of Pennsylvania, renounced its right to act as trustee or executor in the State of Illinois, and an order was entered in that court granting leave so to do. Thereupon the remaining executors and trustees under said will (the appellees) filed this bill in the Superior Court of Cook county, in which it is set forth that the said Pennsylvania Company for Insurance on Lives and Granting Annuities having renounced its right to qualify in the State of Illinois as executor of the last will of said deceased and its right to act as trustee under said will in said State, and having filed a renunciation of such right in the office of the register of wills in the county of Philadelphia, in the State of Pennsylvania, and thereby shaken off the trust and absolutely divested itself of the title, discretion and power to act under said will as to the lands in the State of Illinois, and a certified copy of said renunciation and said proceedings having been recorded in Cook county, Illinois, orators are therefore left as surviving executors to act in the premises, and that they are ready and willing, with leave of court first obtained, to enter into a new contract with the said Bauerle in all substantial respects like the one made on or about the 14th of August, 1890, which is the same contract mentioned in the case above cited. The bill then alleges that orators believe it to be for the best interest of the estate that said property should be sold to said Bauerle upon terms and conditions similar to those contained in said contract of 1890, and they ask leave to sell and convey said property,

and have leave to enter into a new contract with said Bauerle upon similar terms and conditions to those contained in said contract of 1890; that the price offered therefor by said Bauerle was and is a reasonable price to be paid for said estate; that the property was, at the time the original contract was made, vacant and unimproved; that the price agreed to be paid in said contract was then a fair and reasonable price and value for said property, and is still a fair and reasonable value in view of all conditions and circumstances pertaining thereto; that orators are informed and believe that after making said original contract Bauerle took possession, and has ever since held possession, of said described property, and has made certain improvements thereon, but without authority or right so to do; that he caused it to be subdivided into lots, blocks, streets and alleys and acknowledged the plat, but that said plat is void without orators' consent thereto, which consent has never been given; that Bauerle has caused the contract of 1890 and said receipt of \$5000 paid by said Bauerle upon the contract to be recorded; that the recording of said plat and of said contract constitutes a cloud upon the title of orators to said premises, and ought to be removed.

The prayer of the bill was, that the said Bauerle be compelled either to renew with the orators, as surviving executors, and then specifically to perform, the said agreement of 1890, or that a new agreement of like tenor and effect be made between the orators and Bauerle, and to pay the remainder of the purchase money for said land in accordance with the terms and conditions contained in said contract, or to surrender and cancel the same, but if he, for any reason, should be unable to or should refuse to enter into such new agreement of like tenor and effect with said agreement of 1890, and to perform the same within such a reasonable time as this court may direct, and should refuse to surrender and cancel said agreement of 1890, that then and in that case the said contract and

the record thereof may be canceled and held for naught, and that orators be re-instated in like possession of said real estate as the estate of said Shoenberger had before said agreement was made as aforesaid, and that any subdivision or platting made by said Bauerle may be decreed as made without authority and set aside and for naught held, and that orators may have leave to sell the premises to Bauerle, etc.

To this bill Bauerle interposed a demurrer, which was sustained and certain amendments made, in one of which it is averred: "Your orators further show, that, notwithstanding the decision of the Supreme Court referred to, the said defendant, Bauerle, still claims a certain interest in said real estate under the contract referred to, and that the said Bauerle not only claims but offers to purchase the said real estate at the price stated and upon the terms and conditions in the contract made on or about the 14th of August, 1890, a copy of which is attached to the amended bill and marked 'Exhibit B,' provided that he can obtain, by a proper conveyance to be made by said complainants, a good title to the said premises, which can only be done through and by the decree of this honorable court."

To the bill as amended a general demurrer was interposed, which was overruled. Thereupon the defendant, Bauerle, filed his unsworn answer, to which complainants filed exceptions. The gist of the exceptions was, that appellant had not stated in his answer whether he was willing to purchase the said real estate at the price and upon the terms of his former contract, etc. This exception was sustained. An additional answer was then filed by appellant, to which the same exception was filed and sustained. Thereupon a rule was entered requiring appellant to show cause why he should not be attached for failing to answer, etc. Appellant answered this motion for a rule, and the court ordered the bill to be taken as confessed, and referred the cause to a master to take

proof and report. The appellant appeared and cross-examined witnesses and offered evidence in certain matters, and made an offer to prove in his own behalf, etc., which was rejected. The master reported his conclusions, which were confirmed, and a decree was entered finding the recording of the contract a cloud on title and vacating the plat, and for a conveyance by Bauerle of all his interest, and on his default the master convey, etc. The appellant assigns as error the overruling of the demurrer to the bill, the sustaining of exceptions to an unsworn answer, the taking the bill as confessed, and the refusal to allow him to introduce his offered evidence and entering the final decree.

By filing his answer after the general demurrer was overruled the appellant waived his right to assign error to the overruling of his demurrer. (*Brill v. Stiles*, 35 Ill. 305; *Gordon v. Reynolds*, 114 id. 118.) Had he answered as to part of the bill and demurred as to another part, then his rights on the final decree would have been preserved. But when he filed a general demurrer to the bill and it was overruled, and he did not stand by his demurrer but answered over, it was a waiver of the right to assign error to the overruling of the demurrer.

Where a bill makes distinct averments the court has the power to compel a specific admission or denial of all allegations and parts which would require proof. This is authorized by sections 23 and 24 of the Chancery act. Doing so would avoid expense and encumbering the record with proof of matters the defendant might admit or deny. (*Stacey v. Randall*, 17 Ill. 467.) A court of chancery being a court of conscience, a specific answer admitting or denying an averment of a bill is but a requirement to know the truth, and is conclusive to the expeditious disposition of business by the courts. To the end that courts may have specific answers, exceptions may be filed to answers where sworn to, and also where answer under oath is waived. *James T. Hair Co. v. Daily*, 161 Ill. 379.

When the answer was adjudged insufficient the court had the right to require a further answer. The answer of appellant did not meet the averments of the bill, and did not admit or deny that he was ready and willing to enter into a contract such as had been made at the time he filed his contract and receipt for record and platted the land and filed of record the plat. Not being responsive to that averment it was insufficient, and when so adjudged and a rule entered requiring a further answer, this appellant should have filed an answer responsive to that averment of the bill. When his amended answer came in it was obnoxious to the same exception, and again the exception was properly sustained. On the motion for a rule to show cause why an attachment should not issue the appellant answered, and the court did not attach, but entered an interlocutory decree taking the bill as confessed. By the 24th section of the Chancery act it is expressly provided: "When an answer shall be adjudged insufficient, the defendant shall file a further answer within such time as the court shall direct, and on failure thereof the bill shall be taken as confessed." Even if a further answer is filed and that is adjudged insufficient, the bill may be taken as confessed on failure to file an answer in response to a rule so to do.

It becomes important for us to determine the question whether, where part of the answer only is excepted to and held insufficient, the bill can be taken as confessed as to the whole bill or only to that part to which the answer is held insufficient. The object and purpose of the statute being to expedite business and prevent encumbering the records with unnecessary proof and to save expense, where a defendant fails to comply with the statute and answer fully, and where he refuses to comply with the order of court and answer an allegation of the bill, he is by the statute declared to be in the position of one who is in default. He is without an answer. In the words of the statute above quoted, the bill shall be taken

as confessed by him where he fails to file further answer where his answer has been adjudged insufficient. No part of his answer stands in such case. The bill is taken as confessed,—not a part thereof, but the bill itself. It was not error to enter the order taking the bill as confessed. After such order it was in the discretion of the chancellor to enter a decree *pro confesso* or refer the cause to the master to take proof and report, and when so referred the defendant had a right to appear and cross-examine the witnesses for complainants. Of this right he was not deprived. He had no right to offer evidence of matters of defense not set up in an answer.

On our examination of this record we find no reversible error. The decree is affirmed.

Decree affirmed.

HENRY V. BEMIS

v.

ROBERT J. HORNER *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. EVIDENCE—*defendant raising the issue of notice has the burden of proof.* A defendant to a suit on a promissory note who files only special pleas charging the plaintiff with notice of defenses, to which pleas replications denying notice are filed and issue taken thereon, has the affirmative of such issue and the burden of proof.

2. APPEALS AND ERRORS—*party cannot complain of error arising from his own acts during trial.* A defendant cannot complain of an instruction holding the burden of proof to be upon him, where, before trial, he claims the affirmative and is accorded the right to open and close.

3. BILLS AND NOTES—*innocent purchaser before maturity, without notice, takes good title.* One who, in good faith, purchases commercial paper before maturity, for a valuable consideration, without notice of existing defenses, holds a valid title against the world.

4. NEW TRIAL—*affidavit for, must be on file when required by the rules of the court.* A court is justified in overruling a motion for a new trial on the ground of newly discovered evidence, where the affidavit on which the motion is based, and which is required by the rules

165	347
83a	137
165	347
84a	304
165	347
85a	176
165	347
89a	1631
165	347
90a	20
90a	21
165	347
92a	1566
165	347
98a	1115
165	347
98a	1408
165	347
100a	2286
165	347
208	225
106a	159
165	347
115a	506

of the court to be on file, is not filed or before the court when the motion is heard.

5. *SAME*—*newly discovered evidence merely cumulative is not ground for new trial.* An application for a new trial on the ground of newly discovered evidence should be denied when the evidence relied upon is merely cumulative.

6. *SAME*—*newly discovered evidence tending merely to impeach a witness is not sufficient.* Newly discovered evidence which tends merely to discredit or impeach an opposing witness is not ground for new trial.

Bemis v. Horner, 62 Ill. App. 38, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This was an action of assumpsit brought by R. J. Horner and Thomas J. Birkin, a firm known as R. J. Horner & Co., against Henry V. Bemis, on a promissory note dated June 2, 1891, for the sum of \$5000, payable to the order of James W. Miller four months after date, and endorsed to the plaintiffs. To the declaration the defendant pleaded the general issue and six special pleas, but before the commencement of the trial he withdrew the plea of general issue and his last special plea.

The first special plea alleges that the note was not delivered to Miller, but was delivered to one Eugene de Mitkiewicz as an escrow only, to be delivered to Miller for use in the purchase for the defendant of certain stock in a proposed company in case the same should be organized, etc.; that the company was not organized and such stock was not purchased, and that the conditions upon which said escrow might be delivered as a promissory note were never fulfilled, etc., of all of which premises the plaintiffs, before and at the time of taking said note, had notice.

The second special plea alleges that the note was made without any consideration, and that it was not delivered to Miller or to any one as a note, but was exe-

cuted and placed in the hands of Mitkiewicz as an escrow, to be used in the purchase of stock, of which plaintiffs had notice.

The third plea alleges that the consideration has wholly failed, and that the note was made and delivered to Mitkiewicz for use in the purchase of stock for the defendant; that it was not used for that purpose and so the consideration for the note has wholly failed, of all of which plaintiffs had notice, etc.

The fourth special plea alleges that the note was delivered to Mitkiewicz to be held by him for the defendant and to be used by him for the defendant, upon condition that it was not to be delivered to Miller or any one, but was to remain in custody of Mitkiewicz until after the organization of a certain company, which has never been organized and never existed; that the note was to remain the property of defendant until the complete organization of said company, and then to be used only in the purchase of stock in said company for the defendant; that said company was never organized, and said note was not delivered to Miller or any one, but that Miller unlawfully and feloniously stole, took and carried away the said note.

The fifth special plea alleges that the note was made and placed in the hands of Mitkiewicz for certain purposes and to be delivered only upon certain conditions, and was never delivered to Miller or to any one as a promissory note, but was placed in the hands of Mitkiewicz as an escrow only, and that it was fraudulently diverted from the purposes for which it was placed in escrow, and the condition upon which it was to be used was never fulfilled, and that the note was fraudulently turned over to plaintiffs, and that plaintiffs gave no good and valuable consideration therefor.

To each plea the plaintiffs filed a separate replication, in which they denied notice of the facts set up in the plea, concluding to the country, upon which defend-

ant joined issue. On the trial the jury returned a verdict in favor of the plaintiffs for the amount of the note and interest, upon which the court entered judgment, which, on appeal, was affirmed in the Appellate Court.

JOSIAH BURNHAM, for appellant.

HOLLETT & TINSMAN, and JOHN S. COLLMAN, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The facts having been settled adversely to the defendant (appellant here) by the judgment of the Appellate Court; there are but two questions presented by the record for our consideration: First, whether the court erred in the instructions to the jury; and second, was the defendant entitled to a new trial on the ground of newly discovered evidence.

Two instructions were given which are claimed to be erroneous. They are as follows:

"If the jury believe, from the evidence, that the defendant made the note in question, then, under the issues in this case, the defendant assumes the burden of proving, by a preponderance of evidence, not only that the consideration of the note has wholly failed, as alleged in his plea, but also that the plaintiff had notice of the alleged failure of consideration at the time he purchased the note, if it appears from the evidence that he did purchase the note."

"The court instructs the jury that under the issues made up in this case the burden of proof is on the defendant, and he must make out his case by a preponderance of the evidence. If you find the evidence to be equally balanced you should find the issues for the plaintiff."

It will be observed that in the first, second and third pleas notice on the part of plaintiffs of the facts set up in the pleas is averred, and in the replications to all of the pleas the plaintiffs denied notice, concluding to the

country, and upon the replications defendant joined issue. Under the pleadings there was but one issue, and that was, whether plaintiffs had notice of the defense interposed by defendant when they purchased the note upon which the action was brought.

Under the pleadings the inquiry is presented whether the burden of proof rested on the plaintiffs or upon the defendant. When the defendant withdrew the general issue and filed the five special pleas mentioned, he admitted the case made by plaintiffs' declaration and undertook to avoid liability by setting up new facts. Among the facts set up to defeat a recovery on the note was the averment that plaintiffs, at the time they purchased the note, had notice of the defense set up in the pleas. This was an affirmative averment made by the defendant, and under the issue the burden of proof was cast on him. It seems plain, therefore, that the last instruction heretofore set out, to the effect that under the issues made up the burden of proof was on the defendant, was correct.

It is, however, said, the facts set up in the pleas, except on the question of notice, were not denied in the replications, and hence they are to be regarded as admitted, and as the first instruction heretofore set out informed the jury that the burden of proof was cast on the defendant to prove not only notice, but that the consideration of the note had failed, it was erroneous. If the question in regard to the burden of proof rested upon the pleadings alone, we might be inclined to hold that the instruction was erroneous. But such is not the case. After the defendant had withdrawn the general issue, and before the trial began, he claimed the right to open and close the case, and this right was accorded to him by the court. Under this ruling of the court the defendant was permitted to introduce all of his evidence before the plaintiffs introduced any of theirs. The defendant, in introducing his evidence, did not confine himself to the question of notice, but, on the other hand, attempted to

prove all the facts averred and set up in his five pleas. After the defendant closed his evidence then the plaintiffs introduced their testimony, and in the argument to the jury the defendant opened and closed. Thus it appears the defendant asked for and assumed the burden on the trial of the cause, and after he has pursued this course he cannot complain that the court instructed the jury that the burden was upon him. He cannot complain of an error, if error it was, which arose from his own acts during the trial. We do not therefore regard the instructions erroneous.

The jury found, and their finding is fully sustained by the evidence, that the plaintiffs purchased the note before due, for a valuable consideration, without knowledge of any infirmity in the paper, and under the ruling in this State a purchaser under such circumstances is entitled to protection. This question was discussed in *Matson v. Alley*, 141 Ill. 284. It is there said (p. 287): "In *Comstock et al. v. Hannah*, 76 Ill. 530, we cited with approval the following: 'The party who takes it (commercial paper) before due, for a valuable consideration, without knowledge of any defects of title, and in good faith, holds it by a title valid against the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession.' We followed this ruling in *Shreeves v. Allen*, 79 Ill. 553, and *Murray v. Beckwith*, 81 id. 43."

In *Murray v. Beckwith*, 81 Ill. 43, it is said (p. 47): "When the maker of a negotiable instrument puts it in circulation, and it is negotiated before due, and passes into the hands of third parties for a valid consideration, the maker, who alone is responsible for the paper becoming an article of commerce, cannot be permitted to defeat

payment unless he can establish the fact that the holder purchased with notice. The sale and transferring of promissory notes enter largely into the commerce of the country, and public policy requires that an innocent purchaser should be protected."

In *Woodworth v. Huntoon*, 40 Ill. 131, it is said (p. 147): "The assignment of this note to Mary P. Huntoon was before its maturity. This raises the presumption, until it is rebutted, that she received it without notice and in the due course of business. It then devolves upon the party contesting the good faith of the transaction to show that she had notice of the usury, or of such circumstances as would lead to notice, at the time she purchased." See, also, Tiedeman on Com. Paper, sec. 289.

It is next claimed that the court erred in overruling the motion for a new trial, based on newly discovered evidence. The affidavit upon which this motion was predicated was not filed and before the court, as required by the rules, when the motion was heard and decided in the circuit court, and upon this ground, alone, the judgment of the circuit court denying the motion might properly be sustained. But if the affidavit had been properly before the court we do not regard it sufficient. Where the evidence sought to be obtained is merely cumulative the application should be denied. Upon an examination of the affidavit, in connection with the evidence introduced on the trial, it is apparent that the evidence relied upon is merely cumulative.

There is another fatal objection to the application. From an examination of the affidavit it seems plain that the principal object of the evidence sought to be obtained is to overthrow or impeach the testimony of the plaintiffs. The rule is well settled that when the new evidence tends merely to discredit or impeach another witness it will not satisfy the requirements of the law for a new trial.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

JOHN W. FITZGERALD *et al.*

v.

JOHN QUINN.

Filed at Ottawa November 9, 1896—Rehearing denied March 9, 1897.

1. **FORCIBLE DETAINER**—*action of, is a special statutory proceeding summary in its nature.* The action of forcible entry and detainer is a special statutory proceeding, summary in its nature and in derogation of the common law, and the statutory conditions and requirements necessary to jurisdiction must clearly exist and the mode of procedure be strictly followed.

2. **SAME**—*clauses 1 and 3 of section 2 of Forcible Entry and Detainer act construed as to when right of action accrues.* Whether a forcible entry is made into premises in the possession of another, (Laws of 1874, sec. 2, clause 1, p. 535,) or an entry is made into vacant and unoccupied lands or tenements without right or title, (sec. 2, clause 3,) the offense is consummated and the right of action accrues therefor at the moment such entry is made.

3. **SAME**—*right of action does not pass to assignee of party in whom it vests.* The right of action in forcible entry and detainer does not pass to the assignee of the party in whom it vests, and action lies only against the party making the tortious entry, or such others as are collusively in possession under him and are privy to the tort.

4. **SAME**—*one cannot be guilty of unlawful act to which he was not a party.* A party purchasing and taking possession of lands in good faith cannot be turned out by forcible entry and detainer proceedings merely because his grantors, years before, may, without right or title, have made an unlawful entry into the land, then vacant, where there is no privity between them as to the tort.

5. **SAME**—*section 2, clause 2, of Forcible Entry and Detainer act construed.* No right of action can exist under the second clause of section 2 of the Forcible Detainer act, (Rev. Stat. 1874, p. 535,) except where peaceable entry is made upon premises in the actual possession of the complainant or of those to whose rights he has succeeded, and the possession is unlawfully withheld after demand.

6. **SAME**—*plaintiff must show right of possession in himself.* One suing under the Forcible Entry and Detainer act must show a right of possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess.

7. **EVIDENCE**—*actual and peaceable possession of lands is presumed to be rightful.* One who is in the actual and peaceable possession of lands will be presumed to be rightfully in possession, and the burden of proof is upon him who disputes that possessory right.

Fitzgerald v. Quinn, 58 Ill. App. 598, reversed.

165	354
169	92
165	354
184	259
165	354
91a	52
165	354
201	527
165	454
204	140

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

In this proceeding under the Forcible Entry and Detainer act, brought by John Quinn, the appellee, against John W. Fitzgerald and Elizabeth M. Fitzgerald, the appellants, he recovered a judgment before a justice of the peace, and, on appeal, a judgment in the circuit court, and afterwards there was a judgment of affirmance in the Appellate Court.

The complaint filed with the justice of the peace was as follows: "John Quinn complains to J. J. Hennessy, Esq., a justice of the peace in and for said county and State, that he, the said John Quinn, is entitled to the possession of the following described premises in said county, to-wit: All that part of lot 19, in block 2, of James Goodspeed's subdivision of 7.88 acres in the north-west quarter of the north-east quarter of section 9, township 38, north of range 14, east of the third principal meridian, Cook county, Illinois, now occupied by John W. Fitzgerald and wife, Elizabeth M., being a strip of said lot 19, twenty-six inches wide on the west or front end and twenty inches wide on the east or rear end thereof, and immediately contiguous to and south of the north boundary line of said lot 19 aforesaid; that said premises were vacant and unoccupied, and that the said John W. Fitzgerald and wife, Elizabeth M., made entry therein without right or title, and now unlawfully withhold the possession thereof from the said John Quinn, wherefore he prays a summons in pursuance of the statute in such case made and provided.—Dated May 18, A. D. 1891."

In the circuit court the cause was submitted on the following stipulation and agreed state of facts, to-wit:

"The parties to this suit hereby waive a jury and submit this cause to the court, to be tried without a jury, upon the following facts agreed upon: That upon the 21st day of August, A. D. 1883, the plaintiff, John Quinn, obtained a warranty deed to lot 19, block 2, in James Goodspeed's subdivision of 7.88 acres in the north-west quarter of the north-east quarter of section 9, township 38, north of range 14, east of the third principal meridian, in Cook county, Illinois, from Mary A. R. Harrison, (formerly Mary Ann Regina McNamara,) and her husband, Robert Harrison, of Fergus Falls, Minnesota, which deed is recorded in the recorder's office of Cook county as document 503,505, on the 24th day of October, 1883, in book 1428 of records, on page 103, which is here offered in evidence and marked 'Plaintiff's Exhibit A,' claiming title by *mesne* conveyances from the United States government; that after the time said deed was so received, as aforesaid, by the plaintiff, the defendant Elizabeth M. Fitzgerald, who is the wife of the defendant John W. Fitzgerald, obtained a deed to lot 20, in block 2, claiming title by *mesne* conveyances from the United States government, in the same subdivision, which is immediately north of and adjoining said lot 19; that at the time that said deed was made to the plaintiff, the premises, lot 20, or the greater part thereof, were enclosed and a house built thereon, and the same was surrounded by a fence substantially as set down and delineated upon a certain plat of survey which is now introduced in evidence marked 'Plaintiff's Exhibit B,' said south line of said enclosed premises being the most northerly of the red lines marked 'fence' on said plat; that at the time the deed was obtained by the plaintiff a fence encircled the entire enclosure north of the red line marked 'fence' in lot 19 and so much of lot 20 as is included in twenty-five feet north of said line marked 'fence;' that such fence was on the east and west lines, and also on the north side, and twenty-five feet north of said red line marked 'fence,' the

same constituting one entire enclosure; that at the time the deed was obtained by the plaintiff there was upon and on the premises contained in said enclosure a two-story frame building, which building was then occupied by tenants, and continued to be occupied by tenants of parties other than the plaintiff, until the time of the obtaining of the deed by the defendants, upon which date one of the tenants moved out of the second story of said building and the defendants moved into the said second story, and the defendants have continued to occupy the said building and the premises enclosed within said fence continuously from the date of their deed until the date of the service of process in this case, except as herein-after stipulated; that south of and adjoining said house, between the house and the south fence, was a two and one-half foot wide board walk, which extended from the front of said lot to the rear of said lot, and which was being constantly used by the parties in possession of the premises so enclosed; that the plaintiff never, in fact, was in the actual possession of the premises contained within said enclosure unless he was in possession by virtue of his said deed, and the improvement of the street front of lot 19, and the payment of the taxes thereon since 1883 A. D.; that during all the time from time of the obtaining of said deed by the plaintiff until the date of the commencement of this suit the plaintiff never collected any rents from any of the tenants upon said premises, never leased or attempted to lease the same, but that the said premises were leased and the rents therefor collected by persons (other than plaintiff) who held possession of all the premises contained within the said enclosure; that on May 17, 1891,—the day before the commencement of this suit,—the defendants moved the fence on the south line of said enclosure bodily towards the north, on a line running from a point eight inches north of where it stood on the west line to the same point where it stood on the east or rear of the lot. The defendants stipulate for the

purpose of this trial only, and not to be used or claimed against them in any other suit except they shall eventually be found guilty of forcible detainer of the premises in the complaint described in this action, that the north line of lot 19 is the black line running from School street on the west to the alley in the rear, which is the first line north of the north red line marked 'fence' in the plat offered in evidence. It is further stipulated that lot 19 has never been improved or occupied by plaintiff or his grantors in any way except the street improvements in front, and excepting so much of the same as is described in the complaint as has been fenced in and occupied by the said fence and board walk, as hereinbefore stipulated; that said premises were not fenced in by the defendants, but that said fence was there at the time they received their deed to the said lot 20, and that the defendants entered into possession of said premises in a peaceable and quiet manner under the said deed from Taylor to them. The defendants offer in evidence the said deed from Thomas Taylor, Jr., to Elizabeth M. Fitzgerald, recorded in book 2403, at page 354, and make the same a part hereof and mark the same 'Defendants' Exhibit A;' that all of said lot 19 which was south of said fence was, at the time plaintiff obtained his deed, what is called open prairie, and has never been fenced or improved in any way, except that the plaintiff has paid for the street improvements in front of said lot 19. It is hereby stipulated that the summons, the complaint and the notices, and the returns thereon, may be considered in evidence."

Plaintiff's 'Exhibit A:' Deed from Mary A. R. Harrison and husband to John Quinn, to lot 19, in block 2, in James Goodspeed's subdivision, dated August 21, 1883, recorded October 24, 1883, in book 1428 of records, at page 103. Plaintiff's 'Exhibit B:' Plat and survey. Defendants' 'Exhibit A:' Deed from Thomas Taylor, Jr., to Elizabeth M. Fitzgerald to lot 20, in block 3, in said Goodspeed's subdivision, dated September 22, 1888, and

recorded September 24, 1888, in book 2403 of records, at page 354. Demands for possession.

Upon propositions of law submitted to it the court held, "that while the defendants may not have been guilty of forcible entry or forcible detainer prior to the service of the demand in writing for the restitution of the premises in question, yet their refusal to deliver up possession upon demand is, in law, an unlawful detainer, and therefore the action of forcible entry and detainer can be maintained by the plaintiff; that when the title to the property is not in fact disputed, this form of action is more expeditious and inexpensive than ejectment." It also held as follows: "The use by defendants of the strip in controversy may be considered in the nature of a license, which plaintiff might revoke at any time. The agreed facts negative the idea that the defendants or their grantors ever claimed title to the strip in question. A man's title deed (recorded) to a city lot is sufficient notice to the world, and evidence of actual possession, within the meaning of the statute, as against every one who may enter peaceably or otherwise, except as against a person who claims by adverse title."

The court refused to hold, at the request of the defendants, in substance as follows: That to sustain his action the plaintiff must prove, by a preponderance of evidence, that at the time of the entry by the defendants the premises described in the complaint were vacant and unoccupied, or that the plaintiff was in the actual, open and exclusive possession of said premises, and that while the plaintiff was so in possession the defendants intruded themselves into the possession of said premises against the consent of plaintiff. And it also refused to hold, that if, at the time of the alleged entry by the defendants, the premises in question were part of a tract of land which was enclosed by a fence, and that upon said tract so enclosed was situated a dwelling house, which dwelling house was occupied by persons other than plaintiff,

who were then in possession thereof under lease from parties who claimed to own the same, other than the plaintiff, and that defendants, in good faith, peaceably entered into possession of said house and the lot so enclosed, under a deed to defendants, and that the plaintiff was never in possession of the premises described in the complaint except as to so much thereof as defendants surrendered on the 17th day of May, 1891, then the defendants are not guilty of forcible detainer.

FRY & HYDE, for appellants.

MASTERSON & HAFT, for appellee.

Mr. JUSTICE BAKER delivered the opinion of the court:

We may premise by saying that the action of forcible entry and detainer, or forcible detainer, is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly pursued. *Steiner v. Priddy*, 28 Ill. 179; *Schaumtoeffel v. Belm*, 77 id. 567; *French v. Willer*, 126 id. 611; *Burns v. Nash*, 23 Ill. App. 552.

The complaint herein charges "that the said premises were vacant and unoccupied, and that said John W. Fitzgerald and wife, Elizabeth M., made entry therein without right or title, and now unlawfully withhold the possession thereof from the said John Quinn." The only claims that are or can be made are that the case made by the complaint is based either upon the third clause or upon the second clause of section 2 of the Forcible Entry and Detainer act. (Rev. Stat. chap. 57.) Apparently it is based upon the third clause. Said section 2 provides as follows: "The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided: * * * *Third*—When entry is made into

vacant or unoccupied lands or tenements without right or title."

In the case at bar there is no ground whatever for saying that the strip of land off of the north side of lot 19 that was fenced in and used with part of lot 20 was vacant and unoccupied when appellants got their deed and moved into the house. It was, at and prior to that time, in the actual and exclusive possession and occupancy of the tenants who lived in the house and constantly used the board walk and the entire premises enclosed by the fence, and the possession of such tenants was, in contemplation of law, the possession of the landlord under whom they held. Such being the condition of the property, the appellants entered into possession of the entire enclosed premises in a peaceable and quiet manner under their deed from Taylor. It is utterly impossible that land should be fenced in and be constantly, exclusively and peaceably used by a particular person or particular persons, under claim of right, and such land yet be vacant and unoccupied.

The contention of appellee seems to be substantially this: That the statute provides that when entry is made into vacant or unoccupied lands or tenements without right or title, the person entitled to the possession of the same may be restored thereto under the provisions of the statute; that the premises in dispute were at some time vacant and unoccupied, and some grantor, either immediate or remote, of appellants, entered into such vacant or unoccupied ground without right or title, and appellants can have no other or further right or title than their grantors had, and therefore appellee can maintain forcible entry and detainer under this third clause of section 2 of the statute. In making this argument appellee loses sight of the true intent and scope of the Forcible Entry and Detainer act and of the several clauses of this section 2. Three general classes of cases are provided for—one where the original entry was forcible or unlawful;

another, where the original entry was lawful but the detention has become illegal; and the other, where the entry was peaceable but the possession unlawfully withheld. The first clause of the section makes provision for the case of a forcible entry, and the third clause for the case of an entry without right or title into vacant or unoccupied lands or tenements, and these cases both fall within the first of the general classes of cases above noted. The fourth, fifth and sixth clauses make provision for cases that have their origin in contract, and fall within the second of the general classes mentioned, and the case specified in the second clause of the statute constitutes the third of said classes.

Upon the first question that arises in the case we have to do only with the first of these general classes,—that is to say, with the cases for which provision is made in the first and third clauses of the section. Whether a forcible entry is made into premises that are in the possession of another, or an entry is made into vacant and unoccupied lands or tenements without right or title, in either event the offense is consummated the moment such entry is made, and the right to maintain an action of forcible entry and detainer therefor vests at once,—in the one case in him whose actual possession is invaded, and in the other in him whose constructive possession, growing out of paramount title, is invaded. Such right of action does not pass to the assignee of the party in whom it so vests. (*Dudley v. Lee*, 39 Ill. 339; *Thomasson v. Wilson*, 146 id. 384; *Thomasson v. Wilson*, 46 Ill. App. 398.) And, moreover, in such cases where the original entry is tortious or unlawful the action of forcible entry and detainer will lie only against the person who makes the entry, or such other person as is collusively in under him and is privy to the tort. But a person purchasing and taking possession in good faith cannot be turned out by this summary remedy because the party from whom he purchased may, years before, have made an unlawful entry, for a person

cannot be guilty of an unlawful act to which he was not a party and of which he has never heard. *Clark v. Barker*, 44 Ill. 349.

If we should assume the correctness of the contention that the grantor, either immediate or remote, of appellants made entry into the strip of ground in controversy without right or title when it was vacant or unoccupied, yet it clearly appears that such entry was prior to August 21, 1888, when appellee obtained a deed for lot 19 from Mary A. R. Harrison and her husband, and under the doctrine we have stated the cause of action for the illegal entry did not pass to appellee by the deed which he received. So, also, since such entry was many years before appellants got their deed, in 1888, and it does not appear they were in any way privies to or had knowledge of the tort, and since they purchased for a valuable consideration and entered into the possession of the premises in good faith and in a peaceable and quiet manner under their deed, it is manifest that an action does not lie against them, under the statute, for the unlawful entry, without right or title, into the premises when they were vacant and unoccupied,—and this even though the original entry by their immediate or remote grantor may have been such as falls within the statute; and the conclusion must necessarily be that appellee has no remedy against appellants under the third clause of section 2 of the Forcible Entry and Detainer act.

It is claimed by appellee that since demand for possession was made by him and possession refused by the appellants, he, appellee, has a remedy under the second clause of the section, which makes provision for a restoration of possession when a peaceable entry is made and the possession is unlawfully withheld. Under a former and somewhat similar statute, (R. L. 313; Gates' Stat. 313; Rev. Stat. 1845, 256;) which gave the action "if any person shall make an entry into any lands, tenements or other possessions, except in cases where entry is given by law,"

as contradistinguished from a forcible or violent entry, it was held by this court that before the action could be maintained there must be an entry upon the actual possession of another, and that it was not sufficient to charge in the complaint that the complainant's right to the possession was invaded by the entry. (*Atkinson v. Lester*, 1 Scam. 407; *Whitaker v. Gautier*, 3 Gilm. 443.) Under this second clause of section 2 an action lies by the owner of a lot against one holding exclusive possession under a mere license to occupy in common with such owner. *Dunstedter v. Dunstedter*, 77 Ill. 580.

In *Thomasson v. Wilson*, 146 Ill. 384, we had under consideration said second clause of the now existing statute, and we there said that by it a right of action is given for unlawfully withholding the possession from the person entitled to the same, where the entry has been peaceable, and that every detention of premises, after demand duly made, by persons who have intruded *into the possession of another*, becomes an unlawful detention, within the meaning of this statute, however peaceably the entry may have been made. And it was held in that case that the possession of the tenant who was intruded upon was, in law and in fact, the possession of her landlord, the appellee; that the tenant might have maintained an action for possession, and that upon the termination of the lease, and demand for possession by the landlord and refusal by appellant, who had peaceably intruded upon the possession of the tenant, a right of action accrued to the landlord, under this second clause of the statute, for the unlawful detention.

These authorities indicate that there can be no right of action under the second clause of the statute except where the peaceable entry is made upon premises that are in the actual possession of the complainant or of those to whose rights he has succeeded, and our attention is called to no authorities that are to the contrary. Sound reason leads to the same conclusion. A different inter-

pretation of the statute would render insecure the possession of persons who have for many years been in the actual occupancy of improved real estate, claiming ownership, and it would virtually abrogate the security and repose afforded by the statutes of limitation. It surely was not the legislative intention that a complainant can, in the summary way prescribed by the statute and without trial of title, turn out of possession a person who for years has occupied land under claim of ownership, by merely showing that at some remote time in the past such land was vacant or unoccupied, provided some one other than the defendant then held the government or legal title, and that such title was subsequently, by *mesne* conveyances, transferred to the complainant. Such a construction of the statute would be a constant menace to the property of the citizen, and would disturb the peace and welfare of society.

Among the facts agreed upon in the stipulation are these: That lot 19 has never been improved or occupied by plaintiff or his grantors in any way; that plaintiff never was in the actual possession of the premises contained within the enclosure; and that all of lot 19 that lies south of the fence was open prairie at the time he obtained his deed, and that it has never been fenced or improved. Of course, these facts exclude any conclusion that either he or his grantors ever had actual possession of the strip in controversy, and, as we have seen, such possession is essential to a right of action under the second clause of the statute.

It is not made to appear in this record that the possession of appellants is unlawful. No privity of estate is shown to exist between them and appellee. When they, in 1888, were placed in quiet and peaceable possession under their deed from Taylor, they found the property in the actual and exclusive possession of their grantor and his tenants. The person who is in the actual and peaceable possession of land will be deemed to be

rightfully in possession, and the burden of proof is upon him who would dispute that possessory right. (*McLean v. Farden*, 61 Ill. 106; *Gosselin v. Smith*, 154 id. 74; *Preston v. Zahl*, 4 Ill. App. 423.) An adverse possession sufficient, in course of time, to defeat the legal title need not be under a rightful claim, nor even under a muniment of title. (*Turney v. Chamberlain*, 15 Ill. 271; *Noyes v. Hefferman*, 153 id. 339.) One suing under the Forcible Entry and Detainer act must show a right of possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess. *McIlwain v. Karstens*, 152 Ill. 135.

It is urged that either the immediate grantor or some prior grantor of appellants wrongfully entered upon lot 19 and inclosed a part thereof. This is but an assumption. It is just as reasonable to presume that some former owners of lots 19 and 20, respectively, agreed upon the fence as the boundary line between the two lots, or that, prior to the bringing of this action, appellants and their grantors had been in the actual and adverse possession of the strip of ground in controversy for a period of twenty years or more. But these are questions that might properly arise in an ejectment suit. They cannot be tried in this statutory proceeding, where the question of title is not in issue.

The rulings of the circuit court upon the propositions of law submitted to it were inconsistent with the views we have expressed, and were erroneous. The Appellate Court erred in affirming the judgment of the circuit court. The judgments of both courts are reversed, and the cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

HENRY GADE *et al.*

v.

THE FOREST GLEN BRICK AND TILE COMPANY *et al.*

165	367
102a	292

Filed at Ottawa November 9, 1896—Rehearing denied March 6, 1897.

1. CORPORATIONS—*capital stock may be reduced before recording final certificate.* Where the organization of a corporation is complete aside from recording the final certificate of organization, the capital stock may be reduced in conformity to the statute and the organization completed with the reduced capital.

2. SAME—*creditors of corporation cannot complain that surplus stock was not canceled pro rata.* That the cancellation of surplus stock in a corporation was not made *pro rata* is a question which concerns the stockholders only, and does not affect the validity of the reduction as against parties becoming creditors after notice thereof.

3. SAME—*parties becoming creditors after notice of reduction of capital stock are confined to reduced capital.* Parties who do not become creditors of a corporation until after notice of a reduction in its capital stock cannot collect their debts out of subscriptions to the capital stock canceled in the reduction, nor does the fact that the parties are stockholders themselves give them any additional rights as creditors.

Forest Glen Brick and Tile Co. v. Gade, 55 Ill. App. 181, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

H. S. MECARTNEY, for appellants.

ADELBERT HAMILTON, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The issues in this case arose upon a bill filed by appellant Henry Gade and a cross-bill of appellant Charles Harms. The objects of the suit were to have a receiver appointed for the appellee the Forest Glen Brick and Tile Company, a corporation, to marshal its assets, deter-

mine priorities of creditors, to enforce alleged liabilities of stockholders for unpaid stock, to dissolve the corporation and to wind up its affairs. The alleged liabilities for unpaid stock were based on the charge that the capital stock was \$100,000, while it was claimed in defense that such capital stock had been reduced to \$30,000. The circuit court adopted the view that the stock had not been reduced, but on appeal to the Appellate Court the decree was reversed and the cause remanded with directions. (*Forest Glen Brick and Tile Co. v. Gade*, 55 Ill. App. 181.) The Appellate Court having decided that the stock had been lawfully reduced, and the complainants in the bill and cross-bill having refused to amend their pleadings accordingly, the circuit court dismissed said bills. The decree of dismissal was affirmed by the Appellate Court.

The only question presented to this court is, whether the attempted decrease of the capital stock was effectual. One of the reasons alleged for asserting that it was not is, that at the time of the action for that purpose the corporation had not been completely organized. Everything had been done except to record the final certificate. A statement of the persons proposing to form the corporation was filed February 5, 1884, in the office of the Secretary of State, who issued a license to them as commissioners. The capital stock proposed was \$100,000, and it was subscribed and all the steps taken so that a report was made, and on June 26, 1884, the Secretary of State issued a certificate of the complete organization of the corporation. It was necessary to record this certificate in the office of the recorder of Cook county to make the organization complete. (*Loverin v. McLaughlin*, 161 Ill. 417.) The stock of \$100,000 had been subscribed in the expectation that other persons would take part of it, but the subscribers failed to find such persons and therefore concluded to reduce the stock. The proceedings for decrease took place, and the certificate of complete organization was not filed for record until the day that

the certificate of decrease was so filed. The proceeding to reduce the stock was completed two days later by filing the certificate in the office of the Secretary of State. When the proceedings were had the corporation was in being for all purposes incident to the completion of its organization. It had passed every stage except the recording of the certificate that its organization was complete. The amount of its capital stock had been fixed so that it could only be decreased by the method adopted. We see no valid reason why the organization might not be completed with the reduced capital stock, and think that it had such an existence as enabled its officers and stockholders to make the reduction.

Appellants did not become creditors until after the reduction was accomplished and the certificate recorded, and notice duly published, as required by law, that the stock had been reduced. The corporation was then acting on the basis of a capital stock of \$30,000, with due notice of that fact. No case has been cited and no principle invoked by which such creditors having notice of the reduction can collect their debts out of subscriptions to the capital stock canceled by the corporation in the reduction before their rights accrued. Appellants are stockholders, but are only seeking to enforce alleged rights as creditors, and the fact of their being stockholders gives them no additional right as creditors. Nevertheless they claim the right, as creditors, to question the regularity of the proceedings in the reduction. Without saying that they have such a right we are of the opinion that the objections are unfounded.

One objection is, that notice was not delivered or sent to each stockholder as required by statute. Most of the stockholders were present at the meeting, and, so far as they are concerned, it is not material whether they were notified, or how it was done, since the object of notice was fully accomplished. The newspaper notice was published as provided by statute, and the president of

the corporation made his sworn certificate, filed in the office of the Secretary of State, that notice was given to each stockholder, and showing a full compliance with the law in giving the same. There was also testimony that notices were sent to the stockholders. There is nothing against this evidence except a want of recollection as to some stockholders, and this should not prevail after such a lapse of time.

It is also objected that the requisite two-thirds of stock did not vote for the reduction. The record of the meeting kept by the secretary showed that the votes cast for reduction were two hundred and fifty shares against none, and it was declared carried. This is relied upon to show that there was less than a two-thirds vote for the proposition. The sworn certificate of the president above referred to stated that at least two-thirds of all the votes represented by the whole stock of the corporation voted for the resolution, and it was shown that more than two-thirds of the whole stock was voted for the proposition. The entry in the record was explained by proof that the secretary took the number of shares as reduced to \$30,000, and credited as voting for the resolution the ratio of the shares as so reduced. We see no objection to the manner of computing the shares being so explained. The managers of this corporation were inexperienced in business of that character. The records of meetings showed sometimes individual votes instead of votes by shares, and failed to distinguish between meetings of stockholders and directors, and at a stockholders' meeting showed an election of directors by acclamation. Ignorance of proper methods was plainly apparent, but the parties acting in good faith should not suffer on that account if the truth can be determined.

The surplus stock was not canceled *pro rata* and a new basis established among the stockholders by that method, and this is urged as invalidating the proceedings. This, however, is a question among stockholders as to their

rights to stock, but does not affect the reduction. No stockholder is here complaining of the apportionment of the reduced stock. The object was to get rid of surplus stock, and if a subscriber still wanted the same number of shares as before he got them, and where stock was not paid for and not wanted, the number was reduced or left off. Changes were made in the subscription book by erasures and writing new numbers, with the sanction of the parties interested. Whether such a course could have been adopted against the consent of part of the stockholders is not now in question. It was regarded as just by the owners of the stock among themselves, and the question does not concern creditors. Whether the reduction should be spread equally over all the shares and each be allowed to purchase his proportion is not in issue.

The judgment of the Appellate Court will be affirmed:

Judgment affirmed.

THE CITY OF CHICAGO

v.

JOHN MILLER SEBEN.

165	371
171	336
165	371
97a	4657
165	371
196	588
e197	475

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. MOTION—to exclude evidence for variance must show in what the variance consists. A defendant moving to exclude plaintiff's evidence for variance between the declaration and the proof must point out in what the variance consists, to enable the court to decide the question intelligently, and to give the plaintiff an opportunity to amend if the point does not involve the merits.

2. LAW AND FACT—whether negligence proved differs from that charged is a question of fact. Where there is any evidence tending to support the declaration, the question whether the negligence proved, considering the plaintiff's entire evidence, differs from the allegations in the declaration, is one of fact.

3. MUNICIPAL CORPORATIONS—difference in liability for exercise of judicial and ministerial powers. While municipal corporations will

not be held liable in damages for the manner in which they exercise, in good faith, their discretionary powers of a public, legislative or *quasi* judicial nature, yet upon these powers becoming ministerial duties they are liable to actions for damages for their negligent performance.

4. *SAME—distinction between judicial and ministerial powers.* A municipal corporation acts judicially when it selects and adopts a plan for the construction of a public improvement, but in carrying out such plan it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner.

5. *SAME—construction of sewer, after adoption of plan, is a ministerial duty.* The construction and regulation of sewers, built upon the adoption of a general plan, are ministerial duties, and a municipal corporation is responsible in actions for damages caused by its careless or unskillful manner of performing its work.

6. *SAME—sewers must be kept in repair after construction.* While the legal obligation of a municipal corporation organized under the general law to construct gutters and sewers is one which is voluntarily assumed, yet having assumed the obligation and constructed a sewer it must keep the same in repair, and is liable in damages for failure to do so.

7. *EXPERT TESTIMONY—as to proper construction of sewer—when witness is qualified as an expert.* In an action against a city which involves the question of the proper construction of a sewer, it is not error to permit one who had been engaged in sewer building in that city for eighteen years to testify as an expert upon that question.

City of Chicago v. Seben, 62 Ill. App. 248, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

This is an action brought by the appellee against the appellant, to recover damages for a personal injury. The appellant in its brief states the facts as follows: "On the evening of April 8, 1892, while John Miller Seben, a resident of Chicago, and a shoemaker by trade, was walking home after searching for work, he stepped into a sewer inlet at the corner of Polk street and Blue Island avenue, in the city of Chicago, and suffered a double fracture of his left leg, between the knee and the ankle. The night was very dark, there being a thunder storm,

and it was raining. He pulled himself out of the hole, and being discovered by the police, was taken to the Cook county hospital, where he remained for a year. He used crutches for seven months after leaving the hospital, and because of this injury, ever since, he has been unable to follow his trade of shoemaker."

The first count of the amended declaration alleges that the city had control of said street and avenue, and that it was its duty to keep the same in good and safe repair, but that it disregarded its duty and permitted a deep and dangerous hole over and into a certain catch-basin below said street to remain open and uncovered for a long time, to-wit: for three weeks prior to the day of the accident, and to be and remain in an unsafe and dangerous condition, and that by reason of the length of time during which the catch-basin remained open and uncovered, the defendant had due notice, etc.

The defendant filed a plea of not guilty. The case was tried before the court and jury; verdict was rendered in favor of plaintiff; motion for a new trial was overruled, and judgment rendered upon the verdict. Upon an appeal to the Appellate Court, that court affirmed the judgment of the trial court. The present appeal is prosecuted from such judgment of affirmance.

Among the instructions asked by and given for the city, was the following:

"The court instructs the jury, as a matter of law, that the defendant, the city of Chicago, cannot be held liable to the plaintiff for his injury, if it is merely the result of, and caused by a condition of a sewer inlet, which condition was part of a general plan of sewerage adopted by the city, unless you believe the city failed to use reasonable care in determining upon and adopting that plan and that condition, or, unless the plan is such as to be necessarily dangerous; the city, in adopting a system of sewerage for the public benefit, is bound only to exercise reasonable care."

Among the instructions asked by the city and refused by the court, were the following:

1. "First the court instructs the jury, as a matter of law, that the defendant is not liable for any injury to the plaintiff caused by the sewer entrance complained of in this case, where said sewer entrance was constructed in accordance with a plan devised, through no error in judgment and no lack of care and skill, and under the direction of the municipal authorities, and that the jury shall find the defendant not guilty if they believe the sewer inlet in controversy was so constructed.

2. "The court instructs the jury that the defendant is not liable in this case for constructing the sewer complained of, if the sewer was constructed in accordance with a general plan not in itself intrinsically dangerous, under the direction of the municipal authorities; and that the jury are to find the defendant not guilty if they believe the sewer inlet was so constructed."

ROY O. WEST, BENJAMIN F. RICHOLSON, and WORTH E. CAYLOR, for appellant:

Municipal corporations are possessed of *quasi* judicial powers as to public improvements, and the courts have no power to interfere unless it is shown that the injury complained of is the result of negligence on the part of the municipal authorities in devising the plan, or making the improvements in accordance with the plan. For errors in judgment there is no liability. *Child v. Boston*, 4 Allen, 41; *Johnson v. District of Columbia*, 118 U. S. 19; *Dermont v. Mayor*, 4 Mich. 435; *Detroit v. Beckman*, 34 id. 125; *Lansing v. Toolan*, 37 id. 152; *Carr v. Northern Liberties*, 35 Pa. St. 324; *Merrifield v. Worcester*, 110 Mass. 216; *Mills v. Brooklyn*, 32 N. Y. 489; *Urquhart v. Ogdensburg*, 91 id. 97; 97 id. 238; *Hardy v. Brooklyn*, 7 Abb. N. C. 403; *Watson v. Kingston*, 26 Wad. Dig. 95; *Rehrey v. Newburg*, 78 Hun, 611; *Roach v. Ogdensburg*, 80 id. 467; *Schreiber v. New York*, 11 Misc. 551; *Schroth v. Prescott*, 63 Wis. 652; *North Vernon v. Voegler*,

103 Ind. 314; *McChesney v. Hyde Park*, 151 Ill. 634; *Palmer v. Danville*, 154 id. 163; *President v. Rogers*, 2 Ill. App. 96; *Springer v. Walters*, 37 id. 332; *Holman v. Chicago*, 41 id. 44; Dillon on Mun. Corp. secs. 1046-1051; Beach on Pub. Corp. secs. 766, 764.

The plan and construction of a public improvement are not to be determined upon by a jury. *Carr v. Northern Liberties*, 35 Pa. St. 324; *Mills v. Brooklyn*, 32 N. Y. 489.

Negligence in devising the plan by the municipality must be affirmatively shown, and such negligence cannot be inferred from the fact that the plan was defective or worked an injury. *Schreiber v. Mayor*, 11 Misc. 551.

The presumption is that the officers of a municipality have done their duty. *Cummins v. Seymour*, 79 Ind. 491; *Springer v. Walters*, 37 Ill. App. 326; *Palmer v. Danville*, 154 Ill. 163.

The corporation is not bound to do everything that human energy or ingenuity can do to prevent injuries. (*Centralia v. Krome*, 64 Ill. 19; *Chicago v. Gavin*, 1 Ill. App. 302.) Nor to foresee and provide against every possible accident that may occur. *Chicago v. Bixby*, 84 Ill. 82.

MCCRACKEN & CROSS, for appellee:

It is incumbent on the defendant to indicate and point out in what the variance consists, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to amend his pleadings. *Harris v. Shebek*, 151 Ill. 292; *Railway Co. v. Ward*, 135 id. 516.

Whether the negligence proved differs from that alleged in the declaration is a question of fact, where there is any evidence tending to support the declaration. *Harris v. Shebek*, 151 Ill. 292.

The failure to keep in repair, being the breach of a ministerial duty, renders the city liable. 2 Dillon on Mun. Corp. (3d ed.) p. 1076, sec. 1049; 2 Shearman & Redfield on Negligence, sec. 287.

Having adopted a plan, and created an existing condition in a street in pursuance thereof, if that condition renders the street unsafe, a city must go further and perform the duty cast upon it, growing out of statute, to exercise ordinary care to make the street, thus encumbered with the product of its plan, reasonably safe for public travel. *Leoner v. City*, 77 Mo. 431; *Olliver v. City*, 69 id. 79; *Beauden v. City*, 71 id. 393; *Russell v. Inhabitants*, 74 id. 480; *Chicago v. Gallagher*, 44 Ill. 295.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

Two defenses are relied upon by the city. The first is, that there is a variance between the allegations of the declaration and the proof, in that the declaration alleges, that the plaintiff stumbled and fell into a catch-basin, and the proof offered shows, that the plaintiff was injured by stepping into a sewer inlet situated several feet from the catch-basin. The second defense is, that the sewer inlet in question was constructed in accordance with a general plan devised through no error in judgment under the direction of the municipal authorities.

First—As to the variance. It is true, that the second count of the declaration charges that the defendant permitted a certain catch-basin below the intersection of said streets to remain open and uncovered, and that it did not place guards or barriers around the same, nor lights so as to give warning and protect passers-by, and that plaintiff fell into said catch-basin. But the first count alleges, that the defendant permitted “a deep and dangerous hole over and into a certain catch-basin below said streets to remain open and uncovered.” Proof, that the defendant fell into a hole, is not at variance with the allegation that he fell into a “hole over and into a certain catch-basin;” the hole was really a sewer inlet, designed to carry the water off into the catch-basin.

But if there was a variance in the respect thus indicated between the declaration and the proof, the question of such variance is not properly raised and preserved in the record. At the conclusion of the plaintiff's evidence, counsel for defendant moved to strike out the plaintiff's testimony on the ground of variance between the declaration and the proof, but the motion did not point out what the variance was, or in what it consisted. Where the defendant moves to strike out plaintiff's evidence on the ground of variance, it is incumbent on him to point out in what the variance consists, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to amend his declaration, so as to make it conform to the proof, and to avoid defeat upon a point not involving the merits of the claim. (*Libby, McNeill & Libby v. Scherman*, 146 Ill. 540; *Lake Shore and Michigan Southern Railway Co. v. Ward*, 135 id. 511.) In addition to this, there is evidence tending to support the allegation of the declaration, that the hole was over and into a catch-basin; and, therefore, the question of variance upon the plaintiff's whole proof was one of fact, which has been decided against appellant. "The question presented, as to whether the negligence proved differs from that in the declaration, is also a question of fact, where there is any evidence tending to support the declaration." (*Harris v. Shebek*, 151 Ill. 287). For the reasons thus stated, we think there is no force in the objection, that there was a variance between the declaration and the proof.

Second—As to the construction of the sewer inlet in accordance with the general plan. The question, sought to be raised upon this branch of the case, arises out of the refusal of the court to give the refused instructions of the defendant, which are set out in the statement preceding this opinion. It is well settled, that municipal corporations have certain powers which are discretionary or judicial in character, and certain powers which are ministerial. The powers of such corporations have also

been divided into those which embrace governmental duties, such as are delegated to the municipality by the legislature, and in the exercise of which the municipality is an agent of the State; and those powers which embrace *quasi* private or corporate duties, exercised for the advantage of the municipal locality and its inhabitants. Municipal corporations will not be held liable in damages for the manner in which they exercise, in good faith, their discretionary powers of a public, or legislative, or *quasi* judicial character. But they are liable to actions for damages when their duties cease to be judicial in their nature, and become ministerial. (2 Dillon on Mun. Corp. secs. 949, 832; Tiedeman on Mun. Corp. sec. 324). Official action is judicial where it is the result of judgment or discretion. Official duty is ministerial, when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it, prescribes and defines the time, mode and occasion of its performance with such certainty, that nothing remains for judgment or discretion. (*People v. Bartels*, 138 Ill. 322). A corporation acts judicially, or exercises discretion, when it selects and adopts a plan in the making of public improvements, such as constructing sewers or drains; but as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner. (2 Dillon on Mun. Corp. sec. 1048, note 1). A municipal corporation acting in good faith is not liable for any error of judgment in constructing a system of drainage. (2 Dillon on Mun. Corp. sec. 1046, and note; 15 Am. & Eng. Ency. of Law, pp. 1148-1150). In *City of Springfield v. LeClaire*, 49 Ill. 476, we said (p. 478): "Admitting that the power to construct sewers is discretionary as to the time of its exercise, yet when exercised it must be in such a manner as not to expose others to injury; a corporation like individuals is required to exercise its rights and powers, and with such precautions, as shall not subject others to injury."

It has been said, that the work of constructing gutters, drains and sewers is ministerial, and that the corporation is responsible in civil actions for damages caused by the careless or unskillful manner of performing the work. (2 Dillon on Mun. Corp. sec. 1049). It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair, and such duty is not discretionary but purely ministerial. (1 Shearman & Redfield on Negligence, sec. 287; 2 Dillon on Mun. Corp. sec. 1049). The adoption of a general plan of sewerage involves the performance of a duty of a *quasi* judicial character, but the construction and regulation of sewers and the keeping of them in repair, after the adoption of such general plan, are ministerial duties, and the municipality, which constructs and owns such sewers, is liable for the negligent performance of such duties. (1 Beach on Public Corp. sec. 766; *Johnston v. District of Columbia*, 118 U. S. 19; *Seifert v. Brooklyn*, 101 N. Y. 136).

By the terms of the City and Village act, which has been adopted by the city of Chicago, the city council in cities has power to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same; to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gaslights; to construct and keep in repair culverts, drains, sewers, and cesspools, and to regulate the use thereof. (Rev. Stat. 1874, chap. 24, art. 5, sec. 63.) The city, being thus required by law not only to construct but to keep in repair its culverts, drains, sewers and cesspools, is liable in damages for a neglect to perform said duties. It has always been the doctrine of this court, that, while the legal obligation of the city to construct gutters and grade and pave streets is one voluntarily assumed, yet that, when the city constructs these improvements for the benefit of the public, it then

becomes the duty of the city to see that they are kept in repair. (*City of Alton v. Hope*, 68 Ill. 167; *City of Chicago v. Gallagher*, 44 id. 295; *Nevins v. City of Peoria*, 41 id. 502; *City of Joliet v. Verley*, 35 id. 58; *Roberts v. City of Chicago*, 26 id. 249; *City of Bloomington v. Bay*, 42 id. 503; *City of Lacon v. Page*, 48 id. 499; *Browning v. City of Springfield*, 17 id. 143.)

Counsel for the appellant invoke the doctrine, which seems to prevail in the State of Michigan, that, while complaint is made that the original plan of a city improvement is so devised as to render the work dangerous when completed, the fault found is with legislative action, and that a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself; that the wisdom and propriety of local legislative action can not be made a judicial question; that it is and must be a political question, and can arise only between the legislator and his local constituency. The Michigan doctrine is announced in the two cases of *City of Detroit v. Beckman*, 34 Mich. 125, and *City of Lansing v. Toole*, 37 id. 152. It is to be remembered, however, that, in Michigan, a city is not liable for failure to keep its streets and sidewalks in repair, and that, in that State, the duty of keeping them in repair is a duty to the public, not to private individuals, and the mere neglect of such duty is a non-feasance only; and that no action arises for an injury resulting from such neglect; no distinction being there held to exist between the liability of cities, and that of towns and counties. (*City of Detroit v. Blackeby*, 21 Mich. 84; *City of Detroit v. Osborne*, 135 U. S. 492; 1 Beach on Public Corp. sec. 759.) Such a doctrine, however, does not prevail, where, as in this State, the jurisdiction and control over the streets and their improvements are conferred upon the municipal government, so that there follows the obligation to keep the streets and sidewalks free from obstructions, and in a reasonably safe condition. (*Hinds v. City of Marshall*, 22 Mo. App. 208; 2 Dillon

on Mun. Corp. sec. 1046, note 1; 2 Thompson on Negligence, p. 786.) Moreover, in *Town of Waltham v. Kemper*, 55 Ill. 346, this court referred to and refused to follow the decisions of the Supreme Court of Michigan upon this subject, and, in referring to the case of *City of Detroit v. Blackeby*, *supra*, spoke with approval of the dissenting opinion of Mr. Justice COOLEY in that case. A distinction is taken, in the text books and in many of the cases, between the liability of purely municipal corporations, such as cities and chartered towns and villages, and the non-liability of counties and towns as political divisions of the State; such towns and counties being held to be exempt from liability, while chartered cities and villages are held to be subject to such liability. (1 Beach on Public Corp. sec. 757; Tiedeman on Mun. Corp. sec. 339.) This distinction was recognized by this court in the recent case of *Nagle v. Wakey*, 161 Ill. 387, where it was said (p. 392): "The courts draw a distinction between the town and the municipal corporation proper, on the question of liability, in favor of the town." The distinction is furthermore referred to and recognized in the following cases: *Browning v. City of Springfield*, *supra*; *Town of Waltham v. Kemper*, *supra*; *White v. County of Bond*, 58 Ill. 297; *Symonds v. Clay County*, 71 id. 355.) The reason for the distinction, as given by this court in the cases above referred to, is, that cities and chartered towns and villages act under charters, by which valuable privileges are conferred upon them at their request, these privileges being held to be a consideration for the duties imposed upon them; and for the performance of these duties, like individuals, they must be responsible in an action. (*White v. County of Bond*, *supra*). Such organizations are the result of the action of the people, impelled thereto by considerations affecting, more or less, their private interest, while counties and towns do not become so at the special request of the people. Such counties and towns are "involuntary *quasi* corporations, being political

or civil divisions of the State created by general laws to aid in the general administration of the government." (*Symonds v. Clay County*, *supra*). Cities are regarded as corporations created for their own benefit, while the inhabitants of a district invested by statute, *in invitum*, with particular powers, are made corporations without their consent. (*Town of Waltham v. Kemper*, *supra*).

The rule of exemption, growing out of the discretionary powers with which cities are invested in the matter of arranging plans for the prosecution of public improvements, and where they act under the advice of skilled and experienced persons, is carried too far in the Michigan cases referred to; the rule should not be construed, so as to relieve "the city from liability when the plan devised, if put in operation, leaves the city's streets in a dangerous condition for public use." (Tiedeman on Mun. Corp. sec. 350.) Legislative authority only relieves municipal corporations, which make public improvements, from responsibility for the necessary and usual results of a proper exercise of the powers conferred upon them. (15 Am. & Eng. Ency. of Law, 1154.) But the necessary and usual results of the proper exercise of such powers do not include such negligent and unskillful performance of the work as exposes travelers upon the public streets to unusual dangers. (*City of North Vernon v. Vogler*, 103 Ind. 314.) In the case at bar, the declaration does not charge, that the plan of the public improvement was defective, but it charges that the city neglected to keep the crossing of the two streets, named in the declaration, in good repair. If there was any evidence as to the plan adopted by the city for the construction of the sewer inlet to the catch-basin, it was included in a specification for the material and the construction of sewers introduced by appellant, which contained the following provision, to-wit: "The contractor shall leave an inlet to the basin, on the side next to the curb, under the cover, to receive the water from the gutters, eight inches wide and twelve

inches deep." If the sewer inlet had been constructed in accordance with the plan, it would have been only eight inches wide and twelve inches deep; but the proof tends to show that it was about two and a half feet wide, and two and a half feet deep, and three feet long. The tendency of the proof was to show, that, whatever the size of the hole had been originally under the plan of the city, it had become enlarged, and was out of repair; and that the paving-blocks and dirt had been washed away; and that the only gutter was a furrow through the mud. The refused instructions of the appellant referred only to the original construction of the sewer, and ignored the question, whether or not the same, after it was constructed, had been kept in proper repair; they ignored the doctrine, that where the city has adopted a plan and created an existing condition in a street in pursuance thereof, if that condition renders the street unsafe, the city must go further and perform the duty cast upon it, growing out of the statute, to exercise ordinary care to make the street, thus encumbered with the product of its plan, reasonably safe for public travel. For this reason the court committed no error in refusing the instructions asked by the city.

We do not think, that there was any error in the admission of the evidence of the expert witness who was examined by the plaintiff. His testimony was directed to the point that, if the opening or sewer inlet to a catch-basin is more than one foot wide, it is practicable to put an iron grating over it. It appeared that the witness had been a sewer-builder for the city for eighteen years, and was familiar with the construction of catch-basins, inlets and openings of sewers.

The judgments of the Appellate Court and of the Superior Court of Cook county are affirmed.

Judgment affirmed.

MARTIN DOUGHERTY, Sr. *et al.*

v.

WILLIAM E. HUGHES *et al.*

Filed at Ottawa November 23, 1896—Rehearing denied March 6, 1897.

1. **APPEALS AND ERRORS**—*appeal lies from Appellate Court in actions ex contractu when amount involved is \$1000.* An appeal lies from the Appellate to the Supreme Court in actions *ex contractu*, in law or equity, when the amount of the judgment appealed from is \$1000 or over.

2. **EQUITY**—*party having remedy at law cannot resort to equity.* A court of equity cannot entertain a bill the whole scope and object of which are to compel a guardian to pay the complainant a debt claimed to be due him for professional services rendered as attorney for the ward's estate.

3. **SAME**—*permission by probate court to guardian to pay out money does not create a trust.* An order of the probate court giving leave to a guardian "to expend a sum not exceeding" a certain amount for legal services rendered his ward's estate, does not operate to create a trust fund, so as to enable attorneys who rendered the services to resort to equity.

4. **SAME**—*equity will not ordinarily take jurisdiction in administration of estates.* A court of equity will not, except in extraordinary cases, take the administration of an estate from a probate court, but when it does assume jurisdiction the entire administration will be taken into its hands, and not merely a part thereof.

5. **COURTS**—*probate court may exercise equitable powers in matters of guardianship.* In matters relating to guardianship the probate court may exercise equitable powers, and may enter and enforce all orders necessary to a proper and complete settlement of the ward's estate.

6. **ATTORNEYS AT LAW**—*in the absence of agreement attorney has no lien on judgment.* In the absence of an express agreement out of which an equitable assignment arises, an attorney acquires no lien upon a judgment rendered in a suit prosecuted by him, nor upon the money recovered by means of his legal services.

7. **GUARDIAN AND WARD**—*guardian cannot compel, in equity, return of money wrongfully paid out.* Where a guardian expends his ward's money without authority of law, the ward has his action on the guardian's bond or may resort to a proceeding in the probate court for an accounting, but the guardian himself cannot resort to equity to compel a return of the money so expended.

Hughes v. Dougherty, 62 Ill. App. 461, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

In July, 1892, Martin Dougherty, Jr., a minor, received an injury through the negligence, as alleged, of the Chicago, Milwaukee and St. Paul Railway Company. The People's Casualty Claim Adjustment Company, a corporation in Chicago, was then engaged in collecting claims of that character, and said company applied to Martin Dougherty, Sr., the father of the minor, for the collection of the claim for damages against the railroad company. A power of attorney was executed by Martin and Nellie Dougherty, parents of the minor, as follows:

"In consideration of one dollar to us paid, and of service rendered and to be rendered by the People's Casualty Claim Adjustment Company in the matters herein mentioned, we, Martin and Nellie Dougherty, for our minor son, Martin Edward Dougherty, of 154 Edgar street, Chicago, Illinois, by these presents do make, constitute and appoint the said company our attorney, hereby waiving our power to revoke this instrument, for us and in our name, place and stead to settle, adjust, arrange and collect the claim we have against the Chicago, Milwaukee and St. Paul Railroad Company by reason of the injury received by our son, Martin Edward Dougherty, at Edgar street and the railroad tracks, on or about the 20th of May, 1892. Authority is hereby given to sue, in which case we will pay all court costs. In the event our claim is settled without suit, we hereby promise to pay said company for its services one-fourth of the amount received, and in case of suit, one-third of whatever amount is collected. We further promise to accept our share as above in full settlement of our claim, and that we will refer all propositions of settlement to said company, giving and granting to our said attorney full power."

After the execution of the power of attorney the casualty company employed the complainants William E. Hughes and Cyrus J. Wood to institute a suit against the railroad company. Suit was commenced in the circuit court of Kane county, where a judgment was recovered for \$10,000. The master in chancery found that up to this point complainants Hughes and Wood were not employed by the minor or his next friend, or the parents of the minor, but acted solely for the casualty company under their contracts with it. The said company paid Hughes' expenses at the trial and also \$240 attorney's fees, which sums were accepted by him in full payment for services and expenses. Wood was acting for the company upon the basis of receiving ten per cent of the amount received by the company in cases where he was attorney, and said minor's case was commenced under that arrangement by said Wood, and he acted under said arrangement to the time of entry of judgment in the circuit court. The railroad company appealed to the Appellate Court, and that court affirmed the judgment of the circuit court. The railroad company then appealed to this court. In this court complainants procured an order appointing Adolph Moses guardian *ad litem* for the minor, and the guardian *ad litem* employed complainant Hughes to attend to the case here, but before a hearing was had the case was settled, the railroad company paying Martin Dougherty, Sr., who had been appointed guardian of the minor, \$9500.

Thereupon, on February 2, 1895, William E. Hughes and Cyrus J. Wood filed their bill in the Superior Court of Cook county, making defendants thereto the senior and junior Martin Dougherty, (the former then the guardian of the latter,) and also Charles W. Beck and the People's Casualty Claim Adjustment Company. The bill sets forth the performance by complainants of the legal services in and about the original suit, which services, it is alleged, were performed at the request of Martin Dougherty and with the consent of his next friend; that

the reasonable value of said services was \$2000 besides expenses, and that such services were, under the circumstances, necessities supplied by complainants to the said minor during his minority; that the original suit was fraudulently compromised by Martin Dougherty, Sr., who confederated with the casualty company and Beck, its manager, with the purpose of cheating the minor, Martin Dougherty, Jr., and delaying and defrauding complainants in the collection of their claim for services. The bill further alleges that the probate court had entered an order that said guardian, out of money in his hands, should be allowed to pay the sum of \$3166.66 for services to the attorneys entitled to receive it, and that the guardian, confederating with the casualty company and Beck, repudiated complainants' services, and fraudulently paid the \$3166.66 to the former. The bill prayed that the guardian, the casualty company and Beck be required to account for the moneys received belonging to said minor.

E. J. Whitehead was appointed guardian *ad litem* for the minor, and on leave of court filed a cross-bill, among other things denying that the minor or his next friend, or any one in his behalf, had ever employed complainants, and alleging that whatever they did was by virtue of an employment by the casualty company, and that complainants had no right or claim to any part of the fund allowed by the county court to be paid for legal services. The cross-bill prayed that the casualty company, which had received the sum of \$3166.66 so set apart by the county court, might be decreed to repay the same to the guardian of the minor.

The bill and cross-bill were referred to a master in chancery, who took proofs, upon which the master found that the sum of \$3166.66 ought to be returned by said casualty company to the guardian; that complainants, Hughes and Wood, were not entitled to any of said fund for the services rendered by them during the trials of

the case in the circuit court, said services having been rendered under and by virtue of their employment by the casualty company; that for services rendered by them in the Appellate Court and Supreme Court complainants should be paid a reasonable fee, which the master fixed at \$1000, together with certain expenses.

On the hearing the Superior Court of Cook county dismissed the original and cross-bills for want of equity. On appeal the Appellate Court affirmed the decree of the Superior Court in dismissing the cross-bill, but the decree dismissing the original bill was reversed and the cause remanded, with instructions to the Superior Court to enter a decree in favor of complainants therein, and against Martin Dougherty, Sr., and the People's Casualty Claim Adjustment Company, defendants therein, for the sum of \$1000 and costs. From this judgment rendered by the Appellate Court the casualty company and Martin Dougherty, Sr., prosecute this appeal.

DEFREES, BRACE & RITTER, for appellant the People's Casualty Claim Adjustment Company:

Except in extraordinary cases a court of equity will not supersede the probate court, and assume jurisdiction in the administration and settlement of estates. *Shepard v. Speer*, 140 Ill. 246; *Ames v. Ames*, 148 id. 344; *Harding v. Shepard*, 107 id. 264; *Hales v. Holland*, 92 id. 494; *Heustis v. Johnson*, 84 id. 61; *Crain v. Kennedy*, 85 id. 340; *Winslow v. Leland*, 128 id. 304; *Duval v. Duval*, 153 id. 49.

In the settlement of estates and the adjustment of guardians' accounts the probate court is not confined to the exercise of legal powers, but may also exercise equitable powers. *Shepard v. Speer*, 140 Ill. 245; *Wadsworth v. Connell*, 104 id. 369.

Courts of chancery will only aid the probate court with regard to strictly equitable claims. *Goff v. Robinson*, 60 Vt. 633; *Strubher v. Belsey*, 79 Ill. 307; 1 Pomeroy's Eq. Jur. sec. 351; 2 Woerner on Administration, sec. 500.

MCCRACKEN & CROSS, for appellant Martin Dougherty, Sr.:

An attorney at law has no general lien upon the proceeds of a judgment secured through his efforts. *Story v. Hull*, 143 Ill. 506.

E. J. WHITEHEAD, for appellant Martin Dougherty, Jr.

WILLIAM E. HUGHES, and CYRUS J. WOOD, *pro sese*:

Where the legal remedy is not plain, adequate and complete, reaching the whole mischief and securing the whole right, a court of equity will take jurisdiction. 1 Story's Eq. Jur. 24, 25.

The alleged grant of jurisdiction to the probate court, by statute, does not oust that of a court of equity. *Labadie v. Hewitt*, 85 Ill. 341; *Sweeney v. Williams*, 36 N. J. Eq. 627; 1 Story's Eq. Jur. p. 89, sec. 80.

A guardian is a trustee at common law. *In re Steele*, 65 Ill. 324.

As trustee he is accountable to a court of equity. *Grattan v. Grattan*, 18 Ill. 171; *Boyd v. Lockwood*, 33 id. 218; *Cowles v. Cowles*, 3 Gilm. 435; *Lynch v. Rotan*, 39 Ill. 19.

Equity jurisdiction is properly invoked against a guardian in the management of the estate, and in the settlement, distribution and preservation thereof. 2 Story's Eq. Jur. 35, 688; *Cowles v. Cowles*, 3 Gilm. 435.

Mr. JUSTICE CRAIG delivered the opinion of the court:

A motion to dismiss the appeal for want of jurisdiction was reserved until the hearing. As has been seen, the judgment appealed from was for \$1000, and under the ruling in *Baber v. Pittsburg, Cincinnati and St. Louis Railroad Co.* 93 Ill. 342, and *Umlauf v. Umlauf*, 103 id. 651, the amount involved was sufficient, under the statute, to authorize an appeal to this court. The motion to dismiss the appeal will be overruled.

The first question presented is, whether a court of equity has jurisdiction to entertain the bill. It appears

from the master's report, (and the report seems to be sustained by the evidence,) that on the commencement and prosecution of the suit in the circuit court the complainants Hughes and Wood acted solely for and under employment of the casualty company, and they were paid for their services in the circuit court. After an appeal was taken to the Appellate Court the relations existing between the complainants and the casualty company were dissolved, and it is claimed by the complainants that they were employed to prosecute the appeal in the Appellate Court by Samuel W. Hurdle, next friend of the minor, and that the parents of the minor consented in writing that they should attend to the cause in the Appellate Court. Upon looking into the evidence it appears that Samuel W. Hurdle was selected as next friend of the minor by the casualty company before the suit was instituted, and that he acted for the company as solicitor of claims. He testified that he made no arrangement with the complainants to go on with the case and gave them no authority to do so. Mr. and Mrs. Dougherty testified that Wood called on them after the judgment had been obtained in the circuit court and said he and Hughes desired to go on with the suit, to which they replied that the casualty company, and its president, Beck, were to employ lawyers and pay them; that the whole matter was in Beck's hands, and whatever he agreed to would be satisfactory; that Wood replied that the company and Beck had no objections, but were willing for complainants to continue in the case; that relying on their representations they signed a paper authorizing the complainants to appear in the case. It also appears that after the trial of the cause in the circuit court of Kane county, Wood and the casualty company entered into an agreement in writing, in which Wood agreed to accept \$200 in full for services in the company's cases, except the cases of *Dougherty v. Chicago, Milwaukee and St. Paul Railway Co.*, *Elder v. Atchison*, *Topeka and Santa Fe*

Railroad Co. and Hall v. Pennsylvania Co. The agreement contained the following stipulation on behalf of Wood:

"I hereby agree to withdraw from all such suits in which I now appear as attorney of record in the circuit and Superior Courts of Cook county, and in the circuit court of Kane and Will counties, and in the United States Circuit Court of the Northern District of Illinois. In addition to the payment of the above sum of \$200, as aforesaid, the said Cyrus J. Wood is to receive, when the collections are made, the amount set opposite each case given, viz.: *Dougherty v. C., M. & St. P. Ry. Co.*, \$150; *Elder v. A., T. & S. F. R. R. Co.*, \$100; *Hall v. Penn. Co.*, \$25. And also in full for any other services rendered, either legally or otherwise, connected with any business of said company or its clients."

It also appears that after the judgment was affirmed in the Appellate Court and an appeal was taken to this court, on motion of complainant Hughes, Adolph Moses was appointed guardian *ad litem* for the minor, and he at once employed Hughes as his attorney in this court, and under that employment he acted until the case was settled. In this connection it is proper to state that Wood testified that he was employed by Hurdle, the next friend, to attend to the case in the Appellate Court, and Beck testified that on the settlement with Wood he was to remain in the case until it was finally settled or disposed of, but the \$150 mentioned in the agreement was to pay him for his services.

The foregoing are, in brief, all the circumstances under which the services were rendered for which the complainants seek to recover. As has been seen, the complainants were employed to prosecute the case to final judgment in the circuit court by the casualty company. For those services they were employed and paid by the casualty company, and no liability ever existed against the minor, the guardian, or the fund of the minor in the hands of the guardian. As to the services rendered in

the Appellate Court, there is some evidence in the record tending to prove that complainants were employed by Hurdle, the next friend of the minor, but the preponderance of the evidence is the other way. Wood testified that they were employed by Hurdle, but Hughes testified that he never had any conversation with Hurdle in reference to appearing for plaintiff in the case, and Hurdle testified that he did not employ the complainants. In addition to this, Wood signed a written agreement with the casualty company which shows that he had an attorney's fee of \$150 in the *Dougherty case*, to be paid when the judgment should be collected. This would seem to indicate that he was acting for the casualty company in the Appellate Court. Beck, the president of the company, testified that the \$150 to be paid Wood was for services that had been rendered and for services to be rendered up to the time the claim should be collected. If the witness is correct in this, then it is plain that Wood was acting in the Appellate Court for the casualty company. No importance is to be attached to the fact that the parents of the minor requested complainants to attend to the case in the Appellate Court, as they had no authority to bind the minor or his estate, even if they attempted to do so. But if the complainants were employed by Hurdle, as next friend of the minor, we do not think they could recover for the services rendered, in a court of equity. It will be remembered that the purpose of the bill is to collect a debt claimed to be due for professional services. This is the whole scope and object of the bill. It will not be necessary to cite authorities to establish the rule that a party cannot resort to a court of equity where there is a remedy at law; and where a laborer or a professional man has been employed to labor or render professional services for another, and the labor has been performed or the services rendered, an action at law will lie to recover the amount due. Here it is claimed that professional services were rendered under

an employment and these services had not been paid for. If such is the case, no reason is perceived why the complainants have not an adequate remedy at law, and if they have, equity will not take jurisdiction.

But it appears that after the \$9500 had been collected by the guardian the probate court of Cook county made the following order: "This day came Martin Dougherty, guardian of Martin Dougherty, minor, and also came the People's Casualty Claim Adjustment Company, and also came Messrs. Wood and Hughes, and moved the court for an allowance of attorney's fees in the estate of said minor, and on motion it was ordered by the court that said guardian have leave to expend a sum not to exceed one-third of the amount recovered in a right of action arising out of the personal injuries of said minor, and settled under order of this court, as attorney's fees in said estate, the said sum to include all legal services, of whatever nature, in the estate of said minor." Under this order granting leave to the guardian to expend not exceeding one-third of the amount recovered for attorney's fees, it is contended that \$3166.66, being one-third of the estate, was set apart and devoted to the payment of the attorney's fees rendered, and that those who rendered services in producing the fund became beneficiaries of the trust fund, and had the right to resort to a court of equity in the distribution of the fund among those entitled to the money.

As between a minor and his guardian all the money received by the guardian belonging to his ward is a trust fund, the guardian holding in a fiduciary capacity. But the minor, and he alone, is the *cestui que trust*. We do not see how this order established the relation of trustee and *cestui que trust* between the complainants and the guardian of Martin Dougherty, Jr. In the first place, the order does not set apart one-third of the money collected by the guardian for any purpose whatever. The order, when properly understood, is one which merely author-

izes the guardian to pay attorney's fees which may have been incurred by the minor, or the guardian for the minor, in the prosecution of the action against the railroad company. Under this order the guardian had no authority to pay out one-third of the money in his hands or pay out money to any person he might see proper. He had no right to pay more money than was actually and in good faith due, and to persons to whom it was due, and if he exceeded his authority he and his sureties would be liable. The order was a mere permission to apply a portion of certain money in the hands of the guardian, without naming what sum, to the payment of a certain debt. Under this permission the guardian was not bound to pay one dollar, one hundred dollars, or any other definite or fixed amount. It was an order in which neither the complainants nor the casualty company could acquire any vested rights. Under this order, should the guardian pay out to those entitled to receive the money a reasonable amount, his action would be approved by the probate court; but, on the other hand, should he pay out money to persons not entitled to receive it, his action would not be approved. We do not, therefore, regard the fund in controversy as a trust fund, in the sense that it would be within the power or duty of a court of equity to take control of the fund and distribute it among the persons who might be entitled to receive it. Moreover, under paragraph 69 of chapter 37 of the Revised Statutes, probate courts are clothed with original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts. So far as the expenditure of the money in the hands of Martin Dougherty, Sr., guardian of Martin Dougherty, Jr., belonging to the ward, is concerned, the probate court has full power and authority to make and enforce any necessary order.

The law is well settled that a court of equity will not, except in extraordinary cases, take jurisdiction in the ad-

ministration or settlement of estates. (*Shepard v. Speer*, 140 Ill. 238; *Ames v. Ames*, 148 id. 321; *Harding v. Shepard*, 107 id. 264; *Hales v. Holland*, 92 id. 494; *Duval v. Duval*, 153 id. 49.) In the last case cited, after laying down the rule as above stated, it is said (p. 53): "Some special reasons must be shown why the administration should be taken from the probate court." It is also a well established rule that where a court of equity assumes jurisdiction it will take the whole administration of the estate into its hands, and will not assume jurisdiction over a part. (*Winslow v. Leland*, 128 Ill. 304; *Freeland v. Dazey*, 25 id. 294.) Moreover, in the settlement of estates, and in matters relating to guardians and the settlement of their accounts, probate courts are not controlled by the strict rules of law, but they exercise equitable powers. (*In re Steele*, 65 Ill. 322; *Schlink v. Maxton*, 153 id. 447). Here the court of equity has not attempted to take jurisdiction over the entire estate of the minor. Indeed, no foundation was laid for the assumption of such jurisdiction, by the bill. The complainants have no such interest in the settlement of this guardianship as would entitle them to interfere with it in any court. The case made by the complainants by their bill and evidence is merely an application to a court of equity to require the guardian of a minor to pay out of funds in his hands belonging to the minor, an alleged debt for professional services rendered for the minor. There is no similarity between this case and one where a court of equity undertakes to administer on trust funds, or where a court of equity undertakes, for some extraordinary reason, to take upon itself the entire administration of an estate. Indeed, we are aware of no authority which, under the facts of this case, would authorize a court of equity to take jurisdiction.

Townsend v. Radcliffe, 44 Ill. 446, is relied upon as an authority to sustain complainants' bill. In that case one William Radcliffe was appointed administrator of the estate of Nancy Radcliffe, his deceased wife, who died

leaving certain property which she owned in her own right, and leaving children as her heirs. Her husband, after the expiration of two years, settled the estate in the county court and was discharged as administrator. In his final report he charged himself with a certain sum of money,—a balance in his hands after the payment of all liabilities,—which he claimed to own as husband of the deceased. The children and heirs of the deceased filed a bill in equity to compel the former administrator to account for the money in his hands which he claimed as husband of the deceased, and the court held the heirs were entitled to the money as it had not been reduced into the possession of the husband during the lifetime of the deceased, and that a court of equity had jurisdiction. We do not think that case is an authority to control here. There the estate had been settled and had passed out of the probate court. When the bill was filed the county court had ceased to exercise jurisdiction over the estate, and the bill was filed to compel the former administrator to account for certain money which passed into his hands on final settlement of the estate, which belonged to the complainants. There may be found expressions in the opinion delivered in the case which seem to sustain the position of complainants, but the case differs so much from this that it cannot control here. It is true that complainants obtained the judgment in favor of the minor which produced the fund in the guardian's hands which they are now attempting to reach; but they do not claim or pretend that they had a contract under which they were to receive any portion of the judgment for their services, or that they had a contract which gave them a lien on any portion of the judgment. In the absence of an express agreement out of which an equitable assignment arises, an attorney acquires no lien upon a judgment or decree rendered in an action prosecuted by him, or upon the money or fund recovered by means of legal services. (*Story v. Hull*, 143 Ill. 506.) Complainants

occupied no better position in relation to the fund in question than a stranger would occupy who was a mere creditor of the minor.

It is also claimed by the guardian *ad litem* and next friend of Martin Dougherty, Jr., that the court erred in dismissing the cross-bill which was filed to require the casualty company to return the money paid to it by the guardian, Martin Dougherty, Sr. If the guardian paid out money belonging to the ward without authority of law the minor has a remedy at law on the guardian's bond, or proper proceedings may be instituted in the probate court to require the guardian to account for such moneys as came to his hands as guardian. But we do not think resort can be had to a court of equity by cross-bill, as was attempted to be done here.

The judgment of the Appellate Court will be reversed and the decree of the Superior Court will be affirmed.

Judgment reversed.

OBADIAH SANDS

v.

CHARLES H. POTTER.

Filed at Ottawa November 9, 1896—Rehearing denied March 9, 1897.

1. **CONTRACTS**—*degree of mental incapacity required to impeach a contract.* To impeach a contract for mental incapacity the mental weakness must have been such that the party was incapable of understanding what he was doing, or comprehending the terms, scope and effect of his contract.

2. **SAME**—*there is no fixed form for stating requisite degree of mental capacity.* An instruction that a contract cannot be impeached if the parties "possess mind, memory and senses sufficient to know and comprehend the scope, force and effect of their contract," is not antagonistic to one holding that to make a valid contract the parties "must be mentally competent to protect their own interests."

3. **MASTER AND SERVANT**—*when contract creates relation of master and servant.* A contract which contains mutual engagements, on

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79a	217
165	397
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the one part to employ and on the other to serve, is a contract of hiring and service, and creates the relation of master and servant.

4. *SAME—subsequent insanity of master does not terminate servant's contract.* Where the relation of master and servant exists by reason of a mutual contract of hiring and service, the contract is not terminated by subsequent insanity of the master, as the relation in such case is more than the bare relation of principal and agent.

5. *SAME—inability of master to exercise option of discharge does not terminate contract.* Where a contract provides that the master may, at his option, discharge his servant, the inability of the master, by reason of after-occurring insanity, to exercise his option does not, of itself, destroy the mutuality of the contract or terminate the employment.

6. *SAME—nominal incorporation does not abrogate contract of service.* A contract of employment is not abrogated by the subsequent incorporation of the master's business, where the master retains exclusive control, holds all the shares of stock but two, which are nominally held by others, and carries on the business without change, except in name.

7. *PLEADING—contract price due on executed contract may be recovered under common counts.* The stipulated price due on a special contract may be recovered in *indebitatus assumpsit* where the contract has been so fully executed that only the duty to pay money remains.

8. *EVIDENCE—where special contract is admissible under common counts.* A special contract which has been so fully executed that nothing remains but to pay the amount due, may be admitted in evidence under the common counts.

9. *DAMAGES—when contract price as measure of damages is not waived by evidence of reasonable worth.* Where the defense to an action to recover the contract price for services would, if sustained, make the contract void *ab initio*, or show it to have been abrogated before the service was completed, plaintiff does not waive his right to claim the contract price by introducing evidence in rebuttal as to the reasonable value of his services.

10. *LAW AND FACT—rule for assessing damages is a question of law.* The question of the amount of damages allowable in a suit is a question of fact conclusively settled by the finding of the Appellate Court, but the rule for assessing damages in a particular case is a question of law, and reviewable by the Supreme Court.

11. *TRIAL—time when defendant shall make his opening statement is a matter of discretion with the court.* Whether the defendant shall be allowed to reserve his opening statement until the plaintiff has rested his case, or be required to make it immediately following that of the plaintiff, is a matter in the discretion of the trial court.

Sands v. Potter, 59 Ill. App. 206, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. C. W. UPTON, Judge, presiding.

CHARLES WHEATON, and MARK SANDS, for appellant.

C. F. IRWIN, and BOTSFORD & WAYNE, for appellee.

Mr. JUSTICE BAKER delivered the opinion of the court:

Obadiah Sands, the appellant, was engaged in the business of making, buying and selling butter and cheese. On January 30, 1891, he and Charles H. Potter, the appellee, entered into a written contract, as follows:

"This agreement, made this thirtieth day of January, A. D. 1891, between O. Sands, of Chicago, Ill., party of the first part, and C. H. Potter, of Elgin, Ill., party of the second part:

"*Witnesseth:* That in consideration of one dollar to each in hand paid, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to employ the party of the second part for a period of three years, and to pay said second party the sum of \$1800 per annum, payable monthly, and also to pay said second party five per cent of the first \$20,000 of the profits of his butter, cheese and creamery business, and also ten per cent of the next \$10,000 of the profits of his business, and twenty per cent on all profits in excess of \$30,000 per annum, payable annually. Said second party agrees to give his time and services, to the best of his abilities, to the interest of the business, under the direction of said first party. It is further mutually agreed by and between the parties hereto, that said first party can, at his option, terminate this contract at any time. If this agreement should at any time be terminated by the said first party, he shall pay as damages for such termination \$150 at time of such termination, and shall pay said second party his percentage of the profits of said business for the term of six months after such termination of this agreement.

O. SANDS,

C. H. POTTER."

Witness: E. D. SULLIVAN.

Appellee at once entered the employment of appellant under this contract, and continued for the designated

period of three years to do such work as he was directed. He attended to the purchase and sale of butter and to watching the market on the board of trade of the city of Elgin, at times manipulating the market so as to raise the price of butter artificially; he bought and sold butter otherwise than on said board; sold cheese; made various trips east and on the road in effecting sales of butter and cheese and building up a trade; carried on correspondence in furtherance of the same objects; assisted in making purchases of additional creameries, and did other work when required. He had nothing to do with operating the creameries or manufacturing butter or cheese. During the three years of the employment of appellee the business of appellant was much more successful than it had been previously. The profits of the business for said three years were as follows: For 1891, \$35,841.59, for 1892, \$47,883.39, and for 1893, \$52,490.76. The transactions of the three years aggregated \$600,000 for the first year, \$800,000 for the second year and \$850,000 for the third year. At the end of the three years appellee left the employment of appellant, and shortly thereafter brought this suit to recover the moneys that he claimed still to be due him. The results of a jury trial in the Kane circuit court were a verdict and a judgment for \$14,000 damages in favor of appellee, and the judgment was afterwards affirmed in the Appellate Court for the Second District.

The principal ground of defense relied on at the trial was that the contract of January 30, 1891, was void, because entered into by appellant while he was insane or without mental capacity sufficient to make a valid contract. The fact that appellant at that time had sufficient mental capacity to execute the contract is conclusively established by the verdict of the jury and the judgments of the courts below. A contention, however, is made that the verdict was induced by erroneous instructions of the trial court given in that behalf at the instance of the

court below. One of them told the jury that to impeach the written contract for want of mental capacity it must be shown, by a preponderance of evidence, that "the defendant, at the time he executed it, had such a degree of mental weakness that he was incapable of understanding what he was doing and unable to comprehend and understand the terms and effect of the contract, or that the same was procured by some undue influence." Another of them read as follows:

"The jury are further instructed, that although they may believe, from the evidence, that either before, at the time or after the making of the written contract in question defendant had insane delusions on some subjects, yet if the jury further believe, from the evidence, that such delusion was in no way related to the plaintiff or the subject matter of the contract here in question, and that in making such contract defendant was in no means influenced thereby, but that in the making of said contract he possessed mind, memory and senses sufficient to know and comprehend the scope, force and effect of that contract, then he was mentally capable of making said contract, and the jury should so find."

The criticism made upon these instructions is, that they did not explicitly state that defendant must have had "sufficient mental capacity to protect his own interests in executing the contract." We are not aware that there is any fixed formula of words in which the mental capacity or incapacity of a person to make a contract must be expressed. It is true that in the case of *Lindsey v. Lindsey*, 50 Ill. 79, in passing upon the question of the mental imbecility that would invalidate a contract, this court said, that "in the absence of undue influence there must be such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests," and that like language is used in some subsequent cases. But in the *Lindsey* case it is also said that the contract cannot be impeached "if the contracting

party still retains a full comprehension of the meaning, design and effect of his acts." In *Miller v. Craig*, 36 Ill. 109, it is said that mere mental weakness will not authorize a court to set aside a contract if such weakness does not amount to inability to comprehend the contract and is unaccompanied by evidence of imposition or undue influence, and that such is the tenor of all the authorities. Like language is used in *Willem v. Dunn*, 93 Ill. 511. In *Kimball v. Cuddy*, 117 Ill. 213, the words, "a full comprehension of the meaning, design and effect of his acts," are used as designating the degree of mental capacity existing where the contract is valid, and the expression, such "mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests," is used in designating the degree of incapacity required to render the contract invalid.

It is difficult to apprehend how one can "comprehend and understand the terms and effect of the contract," or, in making it, possess "mind, memory and senses sufficient to know and comprehend its scope, force and effect," without being "mentally competent to protect his own interests." This latter phraseology is used in several of the instructions given at the instance of appellant. The legal principle involved in the case is embodied in each set of the instructions,—as well those given on motion of appellee as those given on motion of appellant, and the jury had the benefit of the rule of the law expressed in both forms of phraseology. It was not error to give the instructions asked by appellee.

It is urged it was error to refuse to instruct the jury that if the defendant was mentally incompetent to protect his own interest in making the contract, then, although they may believe he understood the same, yet they should find he was not mentally competent and that the contract was invalid. The terms of the instruction are contradictory, and it was likely to mislead the jury by inducing them to believe that although the defend-

ant fully understood the contract, yet that if he did not have sufficient mental acumen to foresee that his business would so increase as that the per cent of the profits agreed to be paid for appellee's services would amount to the large sum it did, and provide against such contingency, then they should find against the validity of the contract. There was no error in refusing it.

It is claimed that if the contract was valid in its inception, yet it was terminated in August, 1891, by appellant exercising the option for which provision was made therein. No contention is made that the rulings upon the instructions relating to the annulment of the contract by the act of appellant were erroneous. The testimony was conflicting upon the question whether appellant ever attempted to exercise the option given him, and the alleged fact of its exercise is conclusively negated by the judgments we are called upon to review.

In December, 1892, appellant was adjudged insane and was taken to the asylum at Elgin. His wife was appointed conservator. In January, 1894, it was adjudged that he was restored to his reason and the conservator was discharged. The court refused the motion of appellant to instruct the jury that the insanity of the principal terminates an agency, and that if they found, from the evidence, that the defendant became insane after the making of the contract in controversy, they should find that such contract was then terminated. This refusal is claimed as error, and reliance is placed on *Mechem on Agency*, (secs. 553, 554,) and other authorities, which hold that the after-occurring insanity of the principal operates as a revocation or suspension of the authority of an agent exercising a bare power of authority. The rule in question is not decisive of the rights of the parties to this controversy. The legal relation here involved is not the bare relation of principal and agent, but the relation of master and servant, under a mutual and binding contract. The written contract of January 30, 1891, estab-

lished the latter relation between the parties. It was a contract of hiring and service, and there were mutual engagements,—on the one part to serve and on the other to employ and pay. The fact that one party to a contract becomes insane during its performance does not necessarily either suspend or annul such contract. If appellee's services were worth \$5000 a year over and above what he was receiving under the contract, it would hardly be contended that immediately upon the adjudication of insanity he could have abandoned the contract and gone into the service of a rival dealer in butter and cheese without incurring any liability to appellant for so doing. One party cannot be held bound and the other released. The statute (chap. 86, sec. 12,) provides that the conservator, by permission and subject to the direction of the court which appointed him, may perform the personal contracts of his ward made in good faith and legally subsisting at the time of the commencement of his disability and which may be performed with advantage to the estate of the ward, and we know of no rule of law which would relieve the estate of an insane person from liability and damages for the non-performance of a valid contract of such insane person.

But it is urged the right to declare an option, under the contract, was personal to appellant and to be exercised only by him, and therefore the rights under the contract were no longer mutual. The mutual engagements of hiring and paying and of service still remained, and even if one of the parties, without any fault of the other, was disabled from availing of the option that was given him in addition thereto, we know of no rule of law that would necessarily abrogate such mutual engagements. However, a court of chancery would, in a proper case, authorize the conservator to exercise the option on behalf of his ward, and possibly even the county court which appointed the conservator and has charge of the administration of the estate of the ward could make all

necessary and proper orders in the premises. Our conclusion is, there was no error in refusing the instruction.

It appears that in May, 1891, appellant caused a corporation, known as the Elgin Creamery Company, to be formed, and that thereafter that name was used in the business. At the trial of this cause and at the close of the evidence he moved to exclude all evidence of the services rendered or the value of them after the formation of such corporation. This motion was overruled and an exception taken. The court also instructed the jury as follows:

"Although the jury may believe, from the evidence, that on or about May 4, 1891, there was an incorporation effected by the name of the Elgin Creamery Company, and that such name was afterwards used in connection with the business of defendant, yet if the jury further believe, from the evidence, that such corporation was formed for the purpose of convenience or policy in conducting defendant's business, that after its formation business was in fact carried on by O. Sands, and without change except as to using such corporate name, and that the plaintiff's employment remained the same as before, and that there was no understanding or agreement between the defendant and plaintiff that the formation of said corporation should affect the plaintiff's employment in duties or compensation under the written contract in question, then such creation of said corporation and the use of such corporate name would not affect the rights of the plaintiff in said written contract."

It appears from the evidence that in the shipments of product and in the correspondence relating to the business before May 1, 1891, the name "Boone County Butter Company" was used, and after that date that of "Elgin Creamery Company" was in use, but it also appears from the evidence that there was no change otherwise in the manner of conducting the business. All the capital invested in the business, before and after, was furnished

by appellant. All the contracts and purchases of creameries were made in his name. The bank account was kept in his own name and all checks were signed with his name, and all the profits received from the business were received and appropriated by him. The manner of keeping the books was not changed and no dividends of the company declared or paid. Appellant subscribed for 498 of the 500 shares of capital stock, and the other two shares were subscribed for, one share each by two employees of his, and neither of said employees ever paid for or was the real owner of any share, but each of them nominally held one share in order to qualify them, respectively, to act as directors. He was always the real owner of all the shares and all the shares continuously stood in his name, except the few that necessarily, but nominally only, were transferred to his employees and attorneys in order they might be directors and he enabled to perpetrate a fraud on the statute. Under this showing we agree with the Appellate Court that the incorporation of the Elgin Creamery Company was a mere nominal affair, and that the contract between appellant and appellee was not abrogated because of its formation. The creamery company was a mere means or mode adopted by appellant for conducting his own individual business—a mere instrument or tool used by him for that purpose. (*West Chicago Street Railroad Co. v. Morrison, etc. Co.* 160 Ill. 288.) No reason is perceived why appellant, who, under his contract, was entitled to the services of appellee for three years, could not direct appellee to work for him (appellant) in and about his (appellant's) business, which he owned and carried on in the name of Elgin Creamery Company.

We think there was no substantial error in any of the rulings of the trial court upon this branch of the case.

The declaration contains the common counts only. One of the assignments of error is, that the circuit court allowed the plaintiff to introduce in evidence his spe-

cial contract under the common counts, there being no special count on the contract; and it is also assigned as error that the jury was instructed that if the evidence shows that appellee well and faithfully performed all services that were required of him by the terms of the contract, then he is entitled to recover the full compensation therein agreed to be paid for such services. While a contract continues executory the plaintiff must declare specially, but when it has been fully performed on his part, and nothing remains to be done under it except for the defendant to pay, the plaintiff may, at his election, declare generally in *indebitatus assumpsit*. (*Lane v. Adams*, 19 Ill. 167; *Throop v. Sherwood*, 4 Gilm. 92; *Tunnicliffe v. Field*, 21 Ill. 108; *Adlard v. Muldoon*, 45 id. 193.) And the stipulated price due on a special contract may be recovered in *indebitatus assumpsit* where the contract has been so completely executed as that only the duty to pay the money remains. (*Adlard v. Muldoon*, *supra*; *Illinois Linen Co. v. Hough*, 91 Ill. 63.) There was no error, then, in admitting the written contract in evidence, or in instructing the jury that in the event of a right of recovery the measure of damages would be the contract price.

Appellee did not waive his right to claim the contract price as the measure of damages simply because, in rebuttal, he introduced evidence tending to show what his services were reasonably worth. In part the defenses made were, that the special contract was void *ab initio* because of appellant's insanity, that it was subsequently terminated by his exercising his option, and also that it was abrogated by his after-insanity. If either of these defenses were sustained, then appellee, for all or a part of his services, could recover only on a *quantum meruit*, and it is manifest the introduction of the testimony in rebuttal was not an abandonment of the contract price, but a provision to meet any contingency that might follow the findings of the jury on the issues.

It is claimed that the expense account of appellee, amounting to \$1052.51, should have been charged to appellee, because the contract made no provision for it. Appellee testifies that after the making of that contract appellant informed him that he expected to pay his expenses, and that the first money that appellant paid him was a \$50 check for expenses to go to New York on his business. However, it is useless to pursue the subject, for no question of law in regard to this expense account is preserved for our consideration, either by objection to testimony, ruling upon instructions, or otherwise.

It is argued quite at length that even upon the theory of a right to recover, as a part of the compensation of appellee, the rates per cent on the profits of the business, yet the assessment of damages by the jury was excessive. The question of the amount of damages is a question of fact, and upon it the decision of the Appellate Court is final and conclusive. It is true, however, that the question what is the measure of damages, or what is the rule for assessing the damages in a particular case, is a question of law. *City of Joliet v. Weston*, 123 Ill. 641; *Barclay v. Warne*, 143 id. 19.

It is claimed that in the schedule of profits upon which the verdict was based, sufficient reductions were not made in either year from the gross receipts of that year. It is conceded, that the compensation of appellee was computed by the jury upon the profits as shown by the books of appellant himself, and by the testimony of Sullivan, his book-keeper. One Kingswell, an accountant and book-keeper, was produced by appellant as a witness, and he stated he thought it a very proper thing to allow an annual depreciation on the plants as a deduction from profits, and that he would consider the profits to be that which was earned over and above interest on the money invested as capital in the business, but he also testified there is no general rule, and almost as many different ways as there are different book-keepers, and a great

many theories and different methods. The court refused to give an instruction which assumed that whatever said Kingswell had testified was a proper thing was to be implicitly followed as the rule of the law in the premises. The court virtually left it for the jury to determine, from all the evidence in the case, including that afforded by appellant's own books and the testimony of his book-keeper, what was contemplated by the contract as the profits of the business. We find no error in refusing to give the instruction that was submitted by appellant in that behalf.

In the bill of exceptions the following appears: "The plaintiff's counsel having closed his opening statement on the part of the plaintiff, Mr. Wheaton, counsel for the defendant, stated as follows: 'The counsel for the defendant reserve their opening statement to the jury on the part of the defendant until the plaintiff shall have closed his case and the defendant is called upon to put in his defense.' To which the counsel for plaintiff objected. Thereupon the court held that if the counsel for the defendant desired to make an opening statement to the jury on the part of the defense he has to make it now, at the close of the opening statement of the counsel for the plaintiff. To which ruling of the court defendant, by his counsel, then and there excepted." Whether or not counsel for appellant made an opening statement to the jury, and if he did at what time he made it, are matters upon which the record is silent. The practice in this State has always been such as is indicated by the ruling of the trial court. On the other hand, according to the usual course of practice at common law, the opening statement of the defendant is not made until the evidence of the plaintiff has been heard and the plaintiff has rested. In view of the practice that has so generally prevailed in this State from its organization, it must be held that it is a matter within the discretion of the trial court whether a defendant shall be allowed to reserve

his opening statement until the plaintiff has closed his evidence, or be required to make it immediately upon the heels of the opening statement of counsel for the plaintiff. There was no error in the ruling of the court in that behalf.

We find in the record no sufficient ground for reversing the judgment of the Appellate Court. It is affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT took no part.

JOHN STIRLEN

v.

SHERMAN S. JEWETT *et al.*

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. APPEALS AND ERRORS—*how far answering petition waives error in overruling demurrer thereto.* One answering an intervening petition after his demurrer thereto has been overruled waives his right to assign such overruling as error, except so far as he could have the same advantage, in substance, on the final hearing if the petitioner should not be entitled to the relief sought.

2. CREDITOR'S BILL—*remedies at law must be exhausted.* To sustain a creditor's bill a judgment at law must be recovered, execution issued and a *bona fide* attempt made by the sheriff to collect the same, and, if his efforts are unavailing, a return of the execution unsatisfied because having found no property upon which to levy.

3. SAME—*when collusion in filing bill is ground for dismissal.* Collusion between the complainant and the defendant in bringing a creditor's bill proceeding for the appointment of a receiver for the defendant, is ground for dismissal at the instance of a creditor, where there is no actual controversy between the parties and the rights of defendant's creditors are prejudiced thereby.

4. SAME—*kindly intentions toward other creditors are no ground for sustaining creditor's bill.* That complainant filed his creditor's bill for the appointment of a receiver for the defendant because that method was the most advantageous to other creditors is no ground for sustaining the bill, where complainant's remedy at law has not been exhausted.

165	410
79a	118
165	410
95a	*328
95a	*380
165	410
195	*417
165	410
207	1848

5 SAME—*when execution returned by order is not basis for creditor's bill.* The return of an execution unsatisfied, at the order of the plaintiff, is not a sufficient basis for a creditor's bill where the sheriff made no attempt to find property, nor does it matter that the plaintiff's order was entered on the sheriff's docket and did not appear in the return.

Stirlen v. Jewett, 63 Ill. App. 55, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

STIRLEN & KING, for appellant:

Collusion to give a court of chancery jurisdiction of an actual controversy, which is legal in its nature but may become the subject of chancery jurisdiction, is not a fraud on the court or anybody else. *Trainor v. Greenough*, 145 Ill. 543; *Danville Seminary v. Mott*, 136 id. 289.

A return *nulla bona* satisfies the requirement that the creditor must exhaust his remedy at law before filing his creditor's bill. *Malleable Iron Co. v. Graham*, 54 Ill. 266; *Bank v. Gage*, 79 id. 208; *Bowen v. Parkhurst*, 24 id. 259.

The return that the execution is unsatisfied and that the defendant has no property out of which it can be satisfied is a matter of record, and is conclusive as between the parties to the judgment and the officer, only to be questioned in an action for a false return. It shows *prima facie* that the creditor has exhausted his legal remedy and chancery has jurisdiction. *Huntington v. Metzger*, 158 Ill. 272.

JOHNSON & MORRILL, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant, a member of the firm of Stirlen & King, attorneys, obtained a judgment July 5, 1893, in the circuit court of Cook county, against the Chicago Fuel Gas Ap-

pliance Company, a corporation of the city of Chicago, on a note of the corporation for \$250, given for legal services rendered, together with costs and \$50 attorney's fee for entering up the judgment. Execution was issued forthwith, and the president of the corporation appeared in the sheriff's office in company with Samuel B. King, appellant's partner, to have the execution served on him. The execution was served on the president, and at the same time an order was written in the sheriff's docket, as follows:

"Execution No. 43,425.—Gen. No. 117,678.

"Stirlen v. Chicago Fuel Gas Appliance Co.

"Sheriff will return execution in above entitled cause no property found, no part satisfied, forthwith.

Dated July 5, 1893."

STIRLEN & KING.

No further effort was made to collect the money due on the execution, but the order was obeyed and the execution was forthwith returned "No property found and no part satisfied." The parties next appeared on the same day in the circuit court, and a creditor's bill against the corporation was filed by appellant, as complainant, on behalf of himself and all other creditors. The president of the corporation entered its appearance in the suit and consented to the appointment of a receiver, and the appointment was accordingly made. The receiver took possession and continued the business until December 30, 1893. In the meantime, appellees, on August 21, 1893, obtained a judgment against the corporation in the circuit court. An execution upon this judgment was issued and returned unsatisfied, and on September 19, 1893, appellees, by their intervening petition, were admitted to the suit, and asked that the receiver might be dismissed so that they could pursue their remedy against the property of the corporation. Appellant complains that the court erred in overruling his demurrer to this petition, and insists that the facts which would constitute fraud or concealment on his part were not sufficiently stated;

but he cannot assign error on that ground for the reason that he answered the petition. He thereby waived his demurrer, except so far as he could have the same advantage, in substance, on the final hearing, if, upon the petition and proofs, the petitioner should not be entitled to the relief sought. *Gordon v. Reynolds*, 114 Ill. 118.

The petition stated the foregoing facts, and charged that appellant did not exhaust his remedy at law; that he never made a *bona fide* attempt to satisfy his execution; that at the time the execution was in the hands of the sheriff the corporation had ample property at its place of business near by, in the city of Chicago, out of which the execution could have been satisfied; that this was well known to appellant, who was its attorney, but that appellant, by collusion with the defendant corporation, filed the bill and obtained the receiver to hinder and delay the petitioners and other creditors. On a reference to a master the proofs sustained these charges, and he reported the facts to the court, finding that appellant did not exhaust his legal remedy by having the sheriff make proper efforts to collect the judgment, and recommending that the receiver should be discharged and the bill dismissed. On exceptions to the report it was sustained, the receiver was discharged and the bill dismissed. The Appellate Court affirmed the decree.

It is insisted by appellant that collusion between him and the defendant was not ground for a dismissal of the proceedings, and to sustain this claim he refers to the cases of *Danville Seminary v. Mott*, 136 Ill. 289, and *Trainor v. Greenough*, 145 id. 543. In those cases no rights were prejudiced by the giving of deeds of undivided interests in the lands, and there was no intent to deprive third parties of their just and legal rights. Here it cannot be denied that placing the property of the corporation in the hands of a receiver and under the protection of the court by the collusion of the parties would prevent a creditor from reaching the property and obtaining sat-

isfaction of his debt by the ordinary legal means. The collusion was not for the purpose of giving a court of chancery jurisdiction of an actual controversy or to enable appellant to enforce any right, nor was it, as he contends, directed to proper or beneficial ends. The suit was not instituted in the interest of creditors or through any sense of duty toward them. One of the averments of the bill was, that if the sheriff were to seize the property of the corporation on the execution it would result in a sacrifice to the prejudice of complainants and other creditors and the defendant. This averment and the facts proved demonstrate that appellant, as defendant's attorney, was looking after the interest of his client as well as himself in beginning the suit. After the bill was filed the entire proceeding was managed by appellant's firm. The answer was endorsed in the handwriting of his partner, and they were attorneys for the receiver.

Again, appellant says that because the assets of the corporation were not equal to its liabilities it became the duty of its officers to place its affairs in liquidation by some appropriate proceedings, and that since his method of doing so was a good one, in the interest of economy and dispatch and for the benefit of creditors, the court ought to sustain it. If the plan of appellant for winding up the corporation was cheap and expeditious, and therefore for the benefit of creditors, as claimed, that fact would properly be addressed to the creditors as a ground for consent; but if they decline to accept his favors, the superiority of the method over that provided by law would not justify the court in sustaining it. The right of appellant to file the bill and put the corporation in the hands of a receiver, when considered as a matter of law, was dependent upon his exhausting his legal remedy, and kindly intentions toward other creditors would not avail.

It is also argued that the return of the execution was sufficient to authorize filing the bill. In general it is the

duty of a sheriff to hold an execution during its life; but he may take the responsibility of making an earlier return of it, if he has made a demand of property and is unable to find it to satisfy the execution. (*Bowen v. Parkhurst*, 24 Ill. 258; *First Nat. Bank v. Gage*, 79 id. 207.) There is much argument in this case as to whether such a return is conclusive between the parties to the judgment and the officer, but those questions are not important in determining the right to file this bill. Our statute authorizing the filing of a creditor's bill does not introduce any new principle into the law, but is declaratory of a well-recognized, pre-existing principle. A court of equity previously entertained creditor's bills, but would not, before or since, lend its aid where there was an adequate remedy at law. It requires that the plaintiff in the judgment shall have made a *bona fide* attempt to collect his debt by execution against the property of the defendant. (*Durand & Co. v. Gray*, 129 Ill. 9.) In that case it was held that the legal remedy must be exhausted, and although an execution had been issued and returned unsatisfied in the county in which the judgment was rendered, a bill would not lie where the judgment debtor had property in another county at his domicil, which might have been reached by execution to that county. In *Scheubert v. Honel*, 152 Ill. 313, the execution was returned no property found and no part satisfied; but this was done in pursuance of a direction of plaintiff's attorney endorsed on the execution. It was held that these facts failed to show that appellant had exhausted his legal remedies, and that therefore the bill was properly dismissed. The execution must be returned unsatisfied because of inability to find property whereon to levy, but in case of such an order it plainly appears that the return is made because of the direction of the plaintiff.

Appellant relies upon the decision in *Huntington v. Metzger*, 158 Ill. 272, to establish the rule that a direction by the attorney of plaintiff for the return of an execution

will not invalidate the return. In that case the sheriff made efforts to collect the execution. It had been in his hands eleven days when he demanded property of the defendant and informed him of his liabilities, but he failed to satisfy the writ, and five days afterward the writ was returned for the reason that the sheriff was not able to find any property in his county on which to levy it. On the day of the return plaintiff's attorney directed the return to be made. The case of *Scheubert v. Honel*, *supra*, which was like this in having the judgment entered, execution issued and a return by direction of plaintiff's attorney all on the same day, was there said to be very different from the case under consideration. It was said (p. 284): "In order to justify the filing of a creditor's bill, judgment must be obtained, execution must be sued out, the sheriff must make proper efforts to collect the judgment by means of the execution, and, such efforts being unavailing, the execution must be returned by the proper officer unsatisfied by reason of his inability to find property whereon to levy." Where, as appeared from the return in that case, the sheriff has taken all proper steps to collect the execution, he is in a position to take the responsibility of returning it before the expiration of the ninety days; and such facts are not affected by a direction to make the return. The case does not support appellant's claim. In fact, that claim seems to be mainly based on the ground that the order for return was written in the sheriff's docket, and not on the execution. But that circumstance could make no difference. We do not see what importance can be attached to where the instruction was written. It was for the same purpose and had the same effect as if written on the writ, and if written there would have been no part of the sheriff's return.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MORTON CULVER *et al.*

v.

IRVIN B. COUGLE *et al.*

165	417
175	87
185	417
85a	46

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. TRIAL—*stipulation of facts reduced to writing will be enforced.* A stipulation entered into in open court by the attorneys in a case with reference to certain facts, will, at least when reduced to writing or acted upon, be enforced.

2. APPEALS AND ERRORS—*party cannot assign improper default of his co-defendant as error.* That certain defendants were improperly defaulted at trial because of the insufficiency of the affidavit authorizing publication of notice cannot be assigned as error by another defendant, where the parties defaulted are not complaining.

3. AMENDMENTS—*motion to amend in matter of substance comes too late after term.* After the expiration of the term at which a decree was rendered, unless the cause is still depending and the parties are before the court, the power of the court to amend its record is confined to errors and mistakes of its officers.

4. SAME—*there must be some minute in the record by which to amend.* After term has expired at which judgment was entered a court cannot amend a former order unless there is some minute or memorial paper in the record or on the docket to show what the order to be amended in fact was.

Culver v. Cougle, 62 Ill. App. 583, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

MORTON CULVER, for plaintiffs in error.

PARTRIDGE & PARTRIDGE, for defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a bill in equity brought by Irvin B. Cougle and others, plaintiffs below, against Nelson Culver and others, to foreclose a deed of trust executed by Nelson Culver to Newton A. Partridge, conveying the east half of the north-east quarter of the north-west quarter of

section 13, township 41, range 13, in Cook county, to secure the payment of fourteen promissory notes, of \$1000 each, which were dated May 1, 1891, given by Nelson Culver, payable to the order of Cougle Bros. The deed of trust provided for the payment of an attorney's fee of \$100, and the repayment of all money advanced for insurance, taxes and other liens or assessments, with interest thereon. The property described in the deed of trust was subdivided into four blocks, with fifty lots in block 1, twenty-five lots in block 2, twenty-six lots in block 3, and fifty-two lots in block 4. The deed of trust provided that ten lots to be selected by the mortgagor should be released upon the payment of any note. When the bill was filed, on January 6, 1894, four notes had been paid and forty lots released from the deed of trust. The cause having been referred to the master in chancery to take testimony and report conclusions, he found that the amount due on the ten notes remaining unpaid was \$11,916.71; that the amount due for taxes paid by the complainant, and interest thereon, was \$2016.58; that there was \$34.80 due for expenses for advertising and serving notices under the tax sale and \$100 for solicitor's fee, making in all \$14,068.09. Upon the evidence the court entered a decree requiring the amount to be paid within a short day named therein, and in default of payment the premises be sold in satisfaction of the amount due. Upon the rendition of the decree the defendant Morton T. Culver, as appears from the record, excepted to the decree and prayed an appeal to the Appellate Court, which was allowed upon the defendant filing an appeal bond in the penal sum of \$250, with surety to be approved by the court, within thirty days and a certificate of evidence within sixty days. The decree of the Superior Court was affirmed in the Appellate Court, and this writ of error was sued out to reverse that judgment.

The plaintiffs in error rely upon eight grounds to reverse the judgment of the Appellate Court, the first,

second and third of which are as follows: "First, the amount of the decree is excessive, being made up of the amounts of the unpaid notes and taxes purporting to have been paid after the filing of the bill of foreclosure, and for expenses that are unauthorized under the trust deed and under the law; second, the amount allowed for taxes is excessive, including, as it does, penalties and taxes subsequent to the filing of the bill; third, the master allowed eight per cent interest on all moneys advanced for taxes."

As to the notes secured by the deed of trust, they amounted to the sum of \$11,916.71, principal and interest, at the date of the decree, and no greater amount was found to be due by the master.

In regard to the taxes and the interest on the taxes, the parties stipulated before the master in chancery the several amounts advanced, and the master reduced the stipulation to writing and incorporated it in his report. In the stipulation it was expressly agreed that complainants were entitled to interest on each of the amounts advanced for taxes, from the date of payment, at eight per cent, as provided in the deed of trust. Where attorneys in a case deliberately enter into a stipulation in open court in reference to certain facts, the stipulation, at least when reduced to writing or when acted upon, will be enforced. (Thompson on Trials, sec. 361.) Here the stipulation was entered into before the master in chancery, who reduced it to writing and reported the stipulation as a part of the facts in the case, and we think the parties should be bound by the agreement.

It will be observed that the deed of trust providing for interest at eight per cent on taxes advanced, bears date May 1, 1891. At that time the law authorized parties to contract for that rate of interest. Under the deed of trust and stipulation the amount allowed was not excessive.

The fourth point relied upon is, that the court erred in allowing certain defendants to the bill to be defaulted

who were brought in by publication of notice, for the reason that no sufficient affidavit was filed to authorize service by publication. The appearance of Nelson Culver, the mortgagor, and Morton Culver, plaintiff in error, was entered, and it is nowhere claimed that they were not properly in court. The defendants to the bill who were defaulted are making no complaint in regard to the sufficiency of the default entered against them. The error, if one was committed, related to them, and to them alone. It did plaintiffs in error no harm, and they have no just ground of complaint.

The fifth ground relied upon is as follows: "Fifth, the answer of Nelson Culver discloses the fact that he had, prior to the filing of this bill, conveyed one lot to Nellie Culver and five other lots to one Joseph Lebkechner, yet complainants refuse to make these parties defendants, and ignore their rights." Nelson Culver's answer was not sworn to, and, aside from the answer, there is nothing in the evidence or pleadings tending to show that the parties named had any interest whatever in the litigation. In the absence of anything appearing in the record except the answer, which was not verified, we do not think that it was error to proceed to a final decree without making the persons named defendants to the bill.

But it is said, by ignoring the rights of Nellie Culver and Joseph Lebkechner the inverse order of alienation is wrongly stated, to the injury of Nelson Culver and other defendants. Upon an examination of the record, however, it will be found that the order of alienation was agreed to by the solicitors of the parties and incorporated in the report of the master in chancery, and having agreed to the order they cannot now complain. Moreover, upon an examination of the record it will be found, as we understand the record, that the lots are required to be sold in the inverse order of alienation. The rule established by this court in such cases has been strictly observed.

The decree in this cause was rendered and filed in the Superior Court of Cook county on the 16th day of July, 1895, and, as appears from the record, upon the filing of the decree the defendant Morton T. Culver excepted and prayed an appeal to the Appellate Court, which the court allowed upon the said defendant filing an appeal bond in the penal sum of \$250, with surety to be approved by the court, in thirty days and certificate of evidence within sixty days. On the 21st of January, 1896, several terms after the final decree had been rendered and the order for an appeal on behalf of Morton T. Culver had been entered, Morton T. Culver and six other defendants in the bill entered a motion in the Superior Court to amend the judgment allowing the appeal, in such manner that the judgment would show that the six defendants prayed for an appeal and the court allowed the appeal upon the six defendants filing bond. This motion the Superior Court denied, and this is relied upon as error. We are of opinion that the court decided the application right, for two reasons: First, it does not appear that the docket of the court or any minutes entered by the court or clerk show that the six defendants prayed for or the court allowed them an appeal, and in the absence of evidence of that character there was nothing to amend by; and second, the motion to amend after the term of court had closed, in a matter of substance, came too late.

Coughran v. Gutcheus, 18 Ill. 390, is an early case on the question. It is there said (p. 391): "After the expiration of the term, unless the cause is still depending and the parties are in court, their power over the record is confined to errors and mistakes of their officers. * * * Ordinarily these errors and mistakes are apparent from the minutes of the judge, other entries of the same record, or the pleadings and files in the cause. * * * But where there is nothing to amend by, and the court is compelled to learn from the memory of witnesses what its judgment in fact was, it may well be doubted whether,

upon motion and *ex parte* proof, however strong and contradicting the record, an amendment can be made conforming the record of the judgment to such proof."

In *Gebbie v. Mooney*, 121 Ill. 255, it is said (p. 258): "The court cannot make an original order in a case at the term subsequent to that at which final judgment is rendered, but it may at a subsequent term cause the clerk to enter upon the records of the court an order made at a previous term at which judgment was rendered, provided only there shall be some minute or memorial paper from which it can be determined what such order, made at the previous term, was." See, also, the following cases: *Cook v. Wood*, 24 Ill. 295; *Goucher v. Patterson*, 94 id. 525; *Frew v. Danforth*, 126 id. 242; *People v. Anthony*, 129 id. 218; *Ayer v. City of Chicago*, 149 id. 262.

We find no substantial error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

GEORGE F. BLISS *et al.* Exrs.

v.

FANNIE SEAMAN *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 9, 1897.

1. APPEALS AND ERRORS—*Supreme Court may review both facts and law in chancery cases.* The rule that when no propositions of law are submitted, or instructions given, or exceptions taken to rulings upon the admission or exclusion of testimony, at trial, the judgment of the Appellate Court is conclusive on appeal, does not apply to chancery suits. (*Hobbs v. Ferguson's Estate*, 100 Ill. 232, and *Belleville Savings Bank v. Bornman*, 124 id. 200, distinguished and explained.)

2. SAME—*Supreme Court will review facts on appeal from the county court, in the nature of a chancery proceeding.* A claim filed by residuary legatees in the county court challenging the correctness of the annual reports filed by a deceased executor is in substance a chancery proceeding, wherein the Supreme Court will review the facts on appeal from the Appellate Court.

165	422
71a	339
71a	523
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183	559
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183	559
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89a	*46
165	422
187	*569
165	422
e98a	*323
165	422
100a	*73

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3. EXECUTORS AND ADMINISTRATORS—*annual reports of, are only prima facie correct and may be collaterally impeached.* Orders approving the partial or annual reports of executors and administrators filed in the county court are judgments *de bene esse*, and only *prima facie* correct, and, though not excepted to or appealed from, are open to subsequent correction or challenge.

4. SAME—*administrator de bonis non not liable for conversions by former executor.* An administrator *de bonis non* derives his title from the deceased person upon whose estate he administers, and not from the former executor, and he cannot be held to account to the residuary legatees for waste or wrongful conversion of the estate by the former executor.

5. SAME—*residuary legatees may sue personal representatives of deceased executor for his wrongful conversions.* The residuary legatees are the parties in interest who have the right to sue the legal representatives of a deceased executor or administrator for his waste or misappropriation of the assets of the estate.

6. ESTOPPEL—*limits of doctrine that accepting benefits of decree acknowledges its validity.* The doctrine that when a party accepts the benefits of a decree he is estopped to question its validity is only applied when the act done is such that to afterwards question the decree would perpetrate fraud.

7. SAME—*acceptance of distributive shares does not estop the legatees to challenge executor's report.* The acceptance by residuary legatees of amounts admitted to be due by the executor and ordered by the court to be paid them as their distributive shares, will not estop them, before final settlement, from challenging the correctness of the executor's report on which the distribution is based.

Bliss v. Seaman, 59 Ill. App. 236, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. DORRANCE DIBELL, Judge, presiding.

FOWLER BROS., for appellants:

The judgments of courts of general jurisdiction are always held conclusive in collateral proceedings until the same are reversed upon direct proceedings had for that purpose. *McCoy v. Morrow*, 18 Ill. 594; *Cady v. Hough*, 20 id. 45; *Prescott v. Fisher*, 22 id. 393; *Iverson v. Loberg*, 26 id. 182; *Bryant v. Ballance*, 66 id. 188.

Each item in an administrator's account rendered is a separate claim, depending upon its own merits, and as to each item the judgments are separate. *Morgan v. Morgan*, 83 Ill. 96; *Rowson v. Corbett*, 43 Ill. App. 139.

From the finding of the court upon any item an appeal will lie. *Carls v. Brooks*, 71 Ill. 125; 83 id. 196; *Millard v. Harris*, 119 id. 185; *Kingsbury v. Powers*, 131 id. 191.

If a judgment is wrong, it can only be reached by appeal, or by some direct proceeding provided by law to set it aside. *Lynch v. Baxter*, 57 Am. Dec. 735; *Wright v. Wallbaum*, 39 Ill. 554; *Johnson v. Beazley*, 27 Am. Rep. 276.

This court must presume that the probate court heard evidence touching each of the items in controversy, and that the evidence warranted the conclusions arrived at by the court. *People v. McGowen*, 77 Ill. 646; *Railroad Co. v. Chamberlain*, 84 id. 342; *Hobson v. Ewan*, 62 id. 146; *Bowen v. Bond*, 80 id. 351; *Kingsbury v. Powers*, 131 id. 190; *Goudy v. Hall*, 36 id. 313.

When a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors that do not affect the jurisdiction of the court which rendered it. *Cooper v. Reynolds*, 10 Wall. 308; *Johnson v. Wells*, 50 Ill. App. 71; *Herman on Estoppel*, p. 438, secs. 375, 372; *Stempel v. Thomas*, 89 Ill. 146; *Spring v. Kane*, 86 id. 580.

This principle applies equally to the judgments of probate courts. *Lynch v. Baxter*, 51 Am. Dec. 735; *Tucker v. Harris*, 58 id. 488; *Merrill v. Harris*, 57 id. 359; *Doolittle v. Holton*, 67 id. 745.

BREWER & STRAWN, for appellees:

No written propositions of law having been submitted and no instructions whatever asked or given on the trial, the judgment of the Appellate Court settles the questions of fact, and hence nothing is left for review by this court. *Hobbs v. Ferguson's Estate*, 100 Ill. 232; *Tibballs v. Libby*, 97 id. 552; *Steinman v. Steinman*, 105 id. 349; *McDonald v. Allen*,

128 id. 521; *Mutual Aid Ass. v. Hall*, 118 id. 169; *Merrimac Paper Co. v. Bank*, 129 id. 296; *Bank v. Bornman*, 124 id. 200; *Montgomery v. Black*, id. 57.

A partial or annual account is only a judgment *de bene esse*, often rendered *ex parte*, and only *prima facie* correct. 7 Am. & Eng. Ency. of Law, 442-444; *Bond v. Lockwood*, 33 Ill. 212; *Long v. Thompson*, 60 id. 27.

The approval of a report is *prima facie* evidence of its correctness. But this presumption may be rebutted either by evidence or by the account itself. *Bond v. Lockwood*, 33 Ill. 212.

Mr. JUSTICE BAKER delivered the opinion of the court:

Russell Bliss died testate in 1883. His will was probated in the probate court of LaSalle county, and his son Benjamin F. Bliss qualified as executor. Said executor filed an inventory of the estate and an appraisement bill, which were approved by the court. He afterwards filed three reports and a supplemental report, all of which were approved. In his second report he reported \$514.53 in his hands for distribution among the residuary legatees, and in his third report he reported a balance of \$590.35 on hand, and asked for an order of distribution as to \$440.35 of this amount among the residuary legatees, and that he be allowed to retain \$150 to cover further costs and expenses of administration. The court made orders of distribution as asked for in each of these reports. The supplemental report showed distribution of the \$440.35 as ordered, and it was approved on April 7, 1888. The executor, Benjamin F. Bliss, never made any final settlement of his father's estate, nor was he discharged by the court from his office of executor. He departed this life on or about December 14, 1890, and his sons, George F. Bliss and Russell D. Bliss, the now appellants, became executors of his estate, and George F. Bliss was appointed administrator *de bonis non* with will annexed of the estate of his grandfather, Russell Bliss,

deceased, and as such administrator *de bonis non* he has accounted for the \$150 which was ordered to be retained by the original executor of said Russell Bliss, deceased.

The present litigation is based on a claim for \$1500.12 filed in the probate court of LaSalle county by Fannie Seaman, Anna Moore, Daisy Moore, Ida Hunter and Duane Signor, as the residuary legatees under the will of Russell Bliss, deceased, against the estate of Benjamin F. Bliss, deceased. The probate court allowed the claim, and the cause was appealed to the circuit court, where it was tried before the court, the Hon. Dorrance Dibell presiding, without the intervention of a jury. That court allowed the claim, but to the extent of \$1244.90 only, and rendered judgment for that amount. The executors of Benjamin F. Bliss, deceased, prosecuted an appeal to the Appellate Court for the Second District, and errors and cross-errors were assigned. The Appellate Court affirmed the judgment. The executors took this further appeal, and here both the errors and cross-errors are relied on.

Appellees insist that since the case was tried before the court without a jury, and no propositions of law submitted or exceptions taken to rulings upon the admission or exclusion of testimony, therefore no questions of law arise upon the record, and the judgment of the Appellate Court is conclusive upon all questions of fact. The cases relied on to sustain this contention are *Hobbs v. Ferguson's Estate*, 100 Ill. 232, and *Belleville Savings Bank v. Bornman*, 124 id. 200. Both of these cases were claims filed in the probate court against estates of deceased persons, and, like the case at bar, appealed to and tried in the circuit court before the judge without a jury, and from there appealed to the Appellate Court and thence to this court. It was held in each case that the judgment of the Appellate Court settled the questions of fact, and in order to present questions of law to this court as having been involved in the finding of the trial court, written propositions of law should have been submitted to that

court to be held or refused. But there is a marked difference between those cases and the one now before us. In both cases the claims were based on purely legal demands, and contained no elements of equitable jurisdiction. In the *Hobbs* case the claim was for moneys advanced, paid, laid out and expended for the use of the deceased, and in the *Bornman* case the claim was based upon the supposed liability of a guarantor of negotiable paper. In *Dixon v. Buell*, 21 Ill. 203, this court held that in the allowance of claims against the estates of deceased persons the probate court has equitable jurisdiction and may adopt the forms of proceedings in equity. It possesses a similar jurisdiction and may adopt the same mode of procedure that is pursued in the adjustment of the accounts of guardians; and executors, administrators and guardians are alike trustees and responsible as such, and the rules and principles of equity must, to a certain extent, prevail in the adjudication of their accounts. (*In re Steele*, 65 Ill. 322.) In the settlement of estates of deceased persons or adjustment of the accounts of executors, administrators and guardians, the county court may exercise equitable as well as legal powers and adopt equitable forms of procedure. *Brandon v. Brown*, 106 Ill. 519; *Millard v. Harris*, 119 id. 185; *Cheney v. Roodhouse*, 135 id. 257.

If we assume that appellees, for the purpose of establishing the claim which they filed against the estate of Benjamin F. Bliss, deceased, had the right to surcharge the accounts of said Bliss as executor of Russell Bliss, deceased, then, in the matter of said claim, the probate court had jurisdiction and powers similar to those of a court of chancery and properly adopted a procedure similar to that of such court, and the proceeding was in substance a chancery proceeding, and the whole record is now before us for review both upon questions of fact and of law. *Cheney v. Roodhouse*, *supra*; *Kingsbury v. Powers*, 131 Ill. 182.

At the trial the appellees, for the purpose of establishing the items of their claim against the estate of Benjamin F. Bliss, deceased, introduced in evidence the inventory and the several reports and accounts of said Benjamin F. Bliss, as executor of the estate of Russell Bliss, which had been approved by the probate court, and then introduced testimony for the purpose of contradicting and surcharging said reports and accounts. This is the principal ground relied on by appellants for the purpose of reversing the judgments of the courts below. The contention is, that the adjudications of the probate court, and orders made by it approving the different reports and partial settlements, were final and conclusive judgments and not subject to collateral attack, and that therefore said reports and accounts cannot be impeached in this proceeding.

The statute (sec. 112, chap. 3,) makes provision that all executors and administrators shall, every year, exhibit accounts of their administration, but that no final settlement shall be made and approved by the court unless the heirs of the decedent have been notified thereof. A partial or annual account of an executor or administrator is usually an *ex parte* proceeding, and is only a judgment *de bene esse* and only *prima facie* correct, and, although not excepted to or appealed from, is open to subsequent correction or challenge. (7 Am. & Eng. Ency. of Law, 442, and authorities cited in notes; *Bond v. Lockwood*, 33 Ill. 212; *Long v. Thompson*, 60 id. 27; *Bennett v. Hanifn*, 87 id. 31.) As we have seen, Benjamin F. Bliss, the executor of the estate of Russell Bliss, died without having made a final settlement of that estate and without having been discharged as such executor. The only property in his hands not administered upon was the \$150 in money, and this sum, as we have also seen, the administrator *de bonis non* has accounted for. Said administrator *de bonis non* cannot be held to account to the residuary legatees under the will of Russell Bliss for the

money and property that the deceased executor administered upon and wrongfully converted to his own use, nor has such administrator *de bonis non* authority to call on the personal representatives of the deceased executor for an account of the assets of the estate of Russell Bliss other than those unadministered. An administrator *de bonis non* derives his title from the deceased person whose estate he administers upon, and not from the former executor or administrator; and it is the residuary legatees under the will of Russell Bliss who are the parties in interest, and they are the persons who have the right to prosecute the personal representatives of the deceased executor for any waste or misapplication of assets. *Rowan v. Kirkpatrick*, 14 Ill. 1; *Marsh v. People*, 15 id. 284; *Duffin v. Abbott*, 48 id. 17; *United States v. Walker*, 109 U. S. 258.

The residuary legatees may adopt any appropriate remedy they deem proper for the purpose of recovering the value of the money and property that the deceased executor unlawfully appropriated to his own use. They may either bring an action at law against the securities on the bond of such executor, or may file a bill in chancery, or may present a claim in the probate court against the estate and personal representatives of such executor. (*Tracey v. Hadden*, 78 Ill. 30.) And as the probate court, in passing upon the validity of such claim, may exercise either a legal or equitable jurisdiction, and, so far as necessary, adopt the forms and procedure of equity courts, it affords a sufficient, appropriate and speedy remedy. Our conclusion is, that appellees were authorized to appear in that court and file their claim and pursue the course that they did, and that there was no error in allowing them so to do.

It appears that at the time of the second report, and on November 23, 1885, an order was entered by the probate court, in and by which the court found that of the sum of money reported by the executor as then on hand, certain designated amounts were due to each of the re-

siduary legatees, respectively, and ordered the executor to pay to each of them, respectively, his or her distributive share, and that in each of the receipts thereafter given by the several legatees it was recited that the sum specified as paid was "in full of my distributive share, under the will of Russell Bliss, deceased, at distribution made by order of the probate court of LaSalle county, Ill., entered in said estate at the November term, A. D. 1885." And it also appears that a similar order of distribution was made on December 17, 1887, in respect to the \$440.35 mentioned in the report of that date, and that in the receipts given by the respective legatees the sum received was stated as "being my distributive share against said estate ordered to be paid by the probate court of LaSalle county, Ill., December 17, 1887." It is insisted that the receipt of these several sums of money and the recitals in the receipts given therefor estop the residuary legatees from contradicting or surcharging the accounts rendered by the executor and upon which the orders of distribution were based. The doctrine that where a party accepts the benefit of a decree it works as an estoppel and prevents him from afterwards questioning the validity of such decree, has no proper application to the matter now in hand. An estoppel arises only when the act done is such as that to afterwards question the decree would be to perpetrate a fraud. Here the appellees only received that which, without any decree, was already their own under the will of their ancestor, and all that they admitted by the recitals in the receipts they signed was, that they had received in full the several sums of money that the court had at certain designated times ordered to be paid to them. It was no fraud upon the rights of any one that after receiving the amounts that the executor admitted to be due them and that the court ordered to be paid to them, they should claim that they had not received all that was due them from such executor.

The judgment and decree that were rendered by the circuit court were amply sustained by the evidence. The assignments of error and of cross-error in that regard are not well made.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT took no part.

JOHN A. LOMAX

v.

AQUILA H. PICKERING.

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Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. **DEEDS**—*deed requiring approval by the President of the United States passes title on approval.* Where two deeds are executed to property by the same grantor, and the approval of the President of the United States is essential to the validity of a deed to such property, that deed passes title which first receives the President's approval.

2. **SAME**—*approval of deed by President of the United States need not be recorded where the land lies.* The record in the department at Washington of the approval of a deed by the President of the United States is notice of that fact to all concerned; and such approval need not be endorsed upon the deed, nor need any record thereof be made where the land conveyed is located.

3. **SAME**—*recording President's approval does not affect priority.* Where the President of the United States has approved two deeds for the same property, the priority of the one first approved will not be affected by the fact that the approval of the other is first recorded in the recorder's office where the property conveyed is located.

4. **SAME**—*approval of deed by President extended to partition proceedings under which grantor obtained title.* The approval of a deed by the President of the United States will be held to include certain partition proceedings under which the grantor obtained title, where the facts concerning the partition proceedings were before the President when his approval of the deed was given.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

JAMES MAHER, (A. W. BROWNE, of counsel,) for appellant:

As soon as the title to land shall have passed from the United States it takes the character of other property within the State, and is subject to State legislation. 3 Washburne on Real Prop. (3d ed.) 169.

A subsequent purchaser has a right to presume, in the absence of any other information, that whatever title the prior purchaser has is on record, and that he has no title if the record shows none. *St. John v. Conger*, 40 Ill. 535.

A void instrument puts no one upon inquiry as to anything not contained therein. *Jones v. Noel*, 38 Ill. App. 378; *Bullock v. Battenhouser*, 108 Ill. 28.

JOHN P. AHRENS, and L. H. BISBEE, for appellee:

Patents of land from the United States do not come within the purview of the recording laws of the different States, when the terms employed do not specially include them. The original record in the general land office, from which patents are issued, is notice to the world of their existence. *Curtis v. Hunting*, 6 Iowa, 536; *David v. Rickabaugh*, 32 id. 540; *Rhinehart v. Schuyler*, 2 Gilm. 473; *Moran v. Palmer*, 13 Mich. 367; *Sands v. Davis*, 40 id. 14; *Evitts v. Roth*, 61 Tex. 81; *Stevens v. Geiser*, 71 id. 140; 20 Am. & Eng. Ency. of Law, 530.

State registry acts do not apply to patents emanating from either the State or the United States. *Graves v. Bruen*, 1 Gilm. 167.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of ejectment brought by A. H. Pickering, against John A. Lomax, to recover certain premises in Cook county, described in the declaration. On a trial in the circuit court the plaintiff recovered, and the defendant has appealed.

For the purpose of establishing title, the plaintiff, on the trial, introduced in evidence the following article of

the treaty between the United States and the Indians, found in United States Statutes at Large, (vol. 7, p. 320):

"Article 4.—Certain tracts to be granted to certain descendants from the Indians.—There shall be granted by the United States to each of the following persons (descendants from Indians) the following tracts of land, to-wit: To Claude Laframboise one section of land on the Riviere aux Pleins, adjoining the line of the purchase of 1816; to Francis Bourbonne, Jr., one section at the missionary establishment on the River Fox of the Illinois; to Alexander Robinson, for himself and children, two sections on the Riviere aux Pleins above, adjoining the tract herein granted to Claude Laframboise," etc.

The plaintiff also read in evidence a patent for the land, bearing date December 28, 1843. The treaty and the patent both contained the following provision: "To have and to hold the said tract of land, with the appurtenances, unto the said Alexander Robinson, for himself and children, and to his or their heirs and assigns forever, but never to be leased or conveyed by him, them, his or their heirs, to any person whatever, without the permission of the President of the United States." Plaintiff then read in evidence the proceedings in a certain cause in the Cook county court, wherein Joseph Robinson is complainant and Alexander Robinson and others defendants, for partition, wherein the lands in controversy were set off to Joseph Robinson. Plaintiff then read in evidence the following: "Joseph Robinson to John F. Horton.—Deed August 3, 1858; recorded July 16, 1861. (No approval of President.) Joseph Robinson to John F. Horton.—Certified copy of above deed, certified to by recorder August 1, 1870; recorded March 12, 1873. This certified copy has annexed to it certain documents showing it was submitted to Department Interior January 6, 1871; submitted to President January 21, 1871; approved by President January 21, 1871." This was followed by a regular chain of deeds from Horton to the plaintiff.

The defendant claimed title under the following conveyances: "Joseph Robinson to Alexander U. McClure. —Deed dated November 22, 1870; submitted to Interior Department February 21, 1871; submitted to and approved by President February 24, 1871; recorded March 11, 1871." The defendant connected himself with Alexander U. McClure by *mesne* conveyances from McClure to himself.

This is the second time this case has been in this court. On the first trial in the Superior Court the plaintiff in the action was defeated, and on appeal to this court we affirmed the judgment. (*Pickering v. Lomax*, 120 Ill. 289.) We held, under the provision in the treaty and in the patent prohibiting a sale of the premises without the permission of the President of the United States, that the deed made by Robinson without the approval of the President did not pass the title. A Federal question being involved, Pickering, the plaintiff, removed the case to the Supreme Court of the United States, where the judgment of this court was reversed and the cause remanded, the court holding that the President having approved the deed from Robinson to Horton thirteen years and six months after it was executed, validated the instrument. (*Pickering v. Lomax*, 145 U. S. 313.) Upon the second trial in the Superior Court the plaintiff offered the same evidence offered by him on the first trial, (excepting evidence of tax titles, of which there is none in the present record,) so that the evidence of appellee's title now before this court is precisely the same as it was before. The plaintiff's title resting in the deed from Joseph Robinson to John F. Horton dated August 3, 1858, and approved by the President January 21, 1871, having been sustained on the Federal question, which was the vital question in the case, it now only remains to be determined whether the evidence introduced on the second trial by the defendant, which is now for the first time before the court, was sufficient to defeat the title of the plaintiff.

In the opinion of the Supreme Court of the United States it is said: "If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook v. Tullis*, 18 Wall. 332 (338): 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification: The intervening rights of third persons cannot be defeated by the ratification.'" And it is said by appellant that his grantor, McClure, having obtained a deed from Robinson November 22, 1870,—before the deed from Robinson to Horton was approved by the President,—he falls within the exception and is entitled to protection. If the McClure deed had been approved by the President before the President approved the deed made to Horton, the position of appellant might be regarded as well taken. But such was not the case. The deed made to McClure, appellant's grantor, was not approved, and hence did not become a valid conveyance, until February 24, 1871, while in the meantime, and on January 21, 1871, the President approved the Horton deed. Thus the Horton deed, under the ruling of the Federal court, became and was a valid conveyance of the land almost a month before the McClure deed was approved and became effectual as a conveyance. Where, as here, two deeds were executed by the same grantor, the deed first approved by the President will carry the title.

But it is said, the McClure deed is entitled to priority under the recording laws of the State. Section 28 of our statute entitled "Conveyances" provides that "deeds,

mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this State, shall be recorded in the county in which such real estate is situated." By section 30 of the same act it is provided: "All deeds, mortgages and other instruments in writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record." Here the McClure deed, under which appellant claims, with the approval of the President endorsed thereon, was recorded in the recorder's office of Cook county March 11, 1871, while the Horton deed, containing the approval of the President, was not recorded until March 12, 1873, and it is contended that the deed first recorded bearing the approval of the President will take priority over the other deed recorded at a later date.

As respects the approval of the President required by the treaty and the provision in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the President in the department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the State required a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the President for lands that belong to the government, which is not required to be recorded in the county where the land is located. In the American and English Encyclopedia of Law (vol. 20, p. 530,) the author says: "Patents of land from the United States do not come within the purview of the recording laws of the different States when the terms employed do not specially include them. The original record in the general land office, from which patents

are issued, has been held to give notice to the world of their existence,"—citing *Curtis v. Hunting*, 6 Iowa, 536; *David v. Rickabaugh*, 32 id. 540; *Rhinehart v. Schuyler*, 2 Gilm. 473; *Moran v. Palmer*, 13 Mich. 367; *Sands v. Davis*, 40 id. 14; *Evitts v. Roth*, 61 Tex. 81; *Grave v. Bruen*, 1 Gilm. 167.

It was not necessary that the approval of the President should be endorsed on the deed. The approval might have been endorsed on a petition presented to him for his approval, or he might have made a record of the application, with his approval, without endorsing it on any paper. The record made in the department would be the evidence of the fact.

It is also claimed that plaintiff failed to establish title to the lands in question because it does not appear that the partition proceedings in the case of Joseph Robinson against Alexander Robinson and others, under which Joseph Robinson obtained the title to the premises in dispute in the portion of the lands granted to Alexander Robinson and his children, were approved by the President. When the Horton deed was presented to the President for his approval, as appears from the record, in connection with the deed, the President was furnished a statement in regard to the patent issued to Alexander Robinson and his children; also, that a petition for partition had been filed by Joseph Robinson against Alexander Robinson and others; that a decree had been rendered and the lands divided, and that 256 acres have been set off to Joseph Robinson, as shown by a plat presented. These facts were all before the President at the time he made the order approving the Horton deed, and we are inclined to hold that if the proceedings required approval, the approval of the Horton deed executed by Joseph Robinson, predicated, as it was, upon the partition proceedings, was, in contemplation of law, an approval of the partition proceedings.

The judgment of the Superior Court will be affirmed.

Judgment affirmed.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

v.

JUSTUS CHANCELLOR, Admr.

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. EVIDENCE—that party killed at station by railroad train intended to become a passenger is material. Evidence that a party killed by a train at a railroad station intended to take passage on one of the defendant's trains is material in an action against the railroad company for his death, and, if in the form of declarations, is admissible when part of the *res gestæ*.

2. SAME—declarations concerning prospective journey must be connected with the act of departure. To be admissible in evidence as part of the *res gestæ* declarations of a party that he intended to take passage upon a railroad train must be connected with the act of departure.

3. SAME—when declarations are not admissible as *res gestæ*. In an action against a railroad company for causing the death of a woman at its station, a remark made by the deceased to a neighbor, about an hour before her death, while performing her ordinary household duties, that she intended taking passage that morning on one of defendant's trains, is not admissible as *res gestæ*, to show her relation as passenger.

4. APPEALS AND ERRORS—when court should instruct for defendant. Where the evidence in a suit against a railroad company for negligent killing does not tend to prove the elements necessary to entitle the plaintiff to recover, the court should instruct the jury to find for the defendant.

CARTER, J., dissenting.

C. & E. I. Ry. Co. v. Chancellor, 60 Ill. App. 525, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

This action was brought by appellee, as administrator of the estate of Josephine H. Johnson, deceased, to recover damages from appellant for causing the death of appellee's intestate. The declaration contains two counts, in the first of which it is alleged that while the decedent, at Kensington, in Cook county, was with all

due care and diligence in the act of walking from appellant's railway station up to and upon its passenger cars which were then and there waiting to receive her, the appellant so carelessly and improperly drove and managed another locomotive engine and train that it was moved between the passenger station and the passenger train while the passengers were then and there alighting from and mounting the said passenger train; that the said locomotive then and there struck the decedent and killed her. The second count is in substance the same, with the further averment that it was the duty of appellant to keep its track clear and provide a safe and suitable highway for the decedent to walk from its station house to its passenger cars, but that appellant made default therein, and the decedent was struck by an engine and cars moving between the passenger station and the passenger cars, and was killed. To this declaration the general issue was filed, and upon a trial by jury a verdict was returned for appellee in the sum of \$5000. The trial court entered judgment on this verdict, which judgment, on appeal to the Appellate Court for the First District, was affirmed, whereupon this appeal was prosecuted to this court.

On the morning of the accident Josephine H. Johnson, appellee's intestate, went from her home to appellant's passenger station at Kensington about half an hour before the accident, and remained on the platform during that time. While she was there a suburban passenger train arrived from Chicago which ran only to Kensington station. After remaining a few minutes it went back to the city. A short time after, a passenger train arrived from Chicago and proceeded on its way south. Mrs. Johnson remained on the platform and did not take passage on a train in either direction. Meanwhile, during the time between the passing of these trains, a local freight train had been switching back and forth past the station, transacting the usual work of such trains, and

moving from one track to another to keep out of the way of other passing trains. It had been at this station about thirty minutes before the accident. About nine o'clock of this morning another passenger train, known as the "milk train," arrived, bound for Chicago, and had been standing at Kensington station from three to five minutes when the accident occurred. At this station appellant's railroad consists of two main tracks, commonly known as double tracks, and extending nearly north and south. The one on the east was the north-bound track and the west one was for south-bound trains. West of the south-bound track was appellant's regular station building, with its platform, and east of the north-bound track was a platform for the accommodation of passengers going to and from north-bound trains. The two main tracks are situated about eight feet apart. There is no platform between, but there is a cross-walk constructed of twelve-foot planks, extending east from the station building to the other platform east of the north-bound track. A few minutes before the arrival of the milk train the local freight had backed in on the north-bound track to permit the south-bound passenger to proceed, and it was still standing there, necessarily preventing the milk train from proceeding north when ready to start. This train carried a large number of milk cans for Kensington, and a number of minutes were consumed in unloading these. After the train had been standing there several minutes, and perhaps as long or longer than is usually consumed by passengers in alighting and boarding trains, said freight train proceeded to cross over from the north-bound to the south-bound track. There is a "cross-over" track by which this is accomplished. The north end of it is three hundred feet north of the station, and the track is one hundred and eighty-seven feet long. The local freight was headed south, with about fifteen cars behind it and four freight box cars ahead of the engine. The freight conductor, standing on the depot platform,

(the same where the decedent was standing,) signaled his train to proceed south over the cross-over track to the main south-bound track. The engineer whistled "off-brakes," the engine bell was rung, and the freight proceeded at a rate of about four miles an hour, pushing the four box cars ahead of the engine. A brakeman was stationed on top of the south box car and on the south end of it. The decedent was looking toward the milk train, or east from where she stood, according to the weight of the evidence, until the box cars ahead of the engine were within twelve feet of her, when she advanced hurriedly and stepped down from the platform to the track as though to cross to the milk train. A bystander on the platform and the brakeman on top of the advancing car shouted to her, but she either did not hear or paid no attention, and was struck by the cars and instantly killed. The accident occurred about nine o'clock in the morning, in June. It was not disputed but that it was a clear and bright day, and that there were no obstructions nor anything to have obstructed her view of the approaching train.

WILL H. LYFORD, WILLIAM J. CALHOUN, and JOSEPH B. MANN, for appellant.

THORNTON & CHANCELLOR, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The principal error assigned by appellant, and relied on as a reason for reversal of this judgment, is on the admission of improper evidence by the trial court. Over the objection of appellant a witness, Mrs. Laura Stanganan, was permitted to testify for appellee that she was at the house of Mrs. Johnson between seven and eight o'clock on the morning in question, and that Mrs. Johnson was getting ready to go to the city to get a dress, and that she said she was going on the nine o'clock train

because that would take her near to Siegel & Cooper's. At the time this was said she was getting her children ready to go to school. The sole object of this evidence was to show that the decedent intended to become a passenger on appellant's train. This became a material fact in the case, for the reason that if Mrs. Johnson sustained the relation of a passenger at the time of the accident, then appellant was bound to exercise the highest reasonable and practicable degree of care for her safety. (*Chicago and Alton Railroad Co. v. Pillsbury*, 123 Ill. 9; *Chicago and Alton Railroad Co. v. Arnol*, 144 id. 261.) If she did not sustain the relation of a passenger or intended passenger, then only ordinary care was required of appellant. It thus became an important question of fact to be determined whether the decedent sustained the relation of an intended passenger on appellant's train.

The evidence of Mrs. Stangnan, above cited, as to the acts and declarations of decedent an hour before the accident, was practically all that was relied on by appellee to show her relation as a passenger. To controvert this, it was shown by the only persons in charge of appellant's ticket office that she purchased no ticket that morning, and after her death those who took immediate charge of her effects found no ticket and only a few pennies in money in her purse; also, that during the thirty minutes she had been at appellant's station one regular passenger train had departed for Chicago and one in the other direction. The question for consideration is, whether this evidence was part of the *res gestæ*. If so, it was properly admitted by the trial court, and if not, it was error.

Courts have not always found it without some difficulty of determination as to whether or not particular acts or declarations were so nearly contemporaneous or coincident with the act itself as to become part of the *res gestæ*. The rule is thus laid down by Greenleaf: "Declarations, to become a part of the *res gestæ*, must have been made at the time of the act done which they are

supposed to characterize, and have been well calculated to unfold the nature and quality of the facts which they were intended to explain, and so to harmonize with them as obviously to constitute one transaction." Greenleaf on Evidence, sec. 108, note 1. •

One of the cases relied on to support the contention of appellee that this evidence was admissible as part of the *res gestæ* is *Lake Shore and Michigan Southern Railway Co. v. Herrick*, 49 Ohio St. 25. In that case a witness was permitted to testify that on the morning defendant in error left his hotel he said to witness, who was a clerk, that he was going to Collins. He was injured while on his way to the train that ran to Collins. In its opinion the court says: "Was his declaration that he was going to Collins competent evidence of that fact? That depends on whether the declaration was contemporaneous with and explanatory of the act of departure. One departing from home may have in view any conceivable place or any conceivable purpose as his destination or object. The act of departure is thus in itself of the most ambiguous character. It does not afford the slightest clue to the object of the journey. It is natural and usual, according to the natural experience of mankind, that the party should say something respecting his departure of an explanatory character. Declarations thus made are part of the act itself."

Where the evidence shows the party is about to start on a journey, from common experience we know it is usual and natural that something is said by the party relating to the departure, and of a character indicative or explanatory. For such declarations to be admissible in evidence as part of the *res gestæ* they must be made in connection with an act proven, as in the case above cited. The rule is, that the *res gestæ* generally remains with the *locus in quo*, and it does not follow the parties after the principal act is completed. The authorities to which we are cited in argument are principally those in which the

declarations sought to be considered were made after the act or injury with which they are attempted to be connected. The rule is, in determining whether or not declarations made before or after the principal act are to be considered as part of the *res gestæ*, lapse of time is taken into consideration, and such declarations made after the principal act will not be considered as part of the *res gestæ* if there is any change from the place of occurrence of the principal act or in the condition of the parties. The evident reason of the rule is, that in such event an opportunity for fabrication might be given or testimony might be manufactured by interested parties. Whether or not such act or declarations will be so considered must depend upon the circumstances of each case. The real test is, whether the principal act and the declarations sought to be considered as part of the *res gestæ* are separated from each other by such a lapse of time as to render it probable that the parties are speaking from designing purposes rather than instinctive impulse. It can be stated as the general rule, that anything said or done before the principal act occurred or was within the contemplation of the parties cannot be regarded as part of the *res gestæ*, although only separated by the least possible span of time, unless it tends to explain and unfold the principal act by the undesigned act or declaration of the party, for the reason that such declaration or act could not be said to throw any light upon the motives of the parties. A person desiring to commit suicide might, an hour before the act, declare that he intended to become a passenger upon a train, when, as a matter of fact, no such intention existed in his mind, but the only intention there existing might be to go to a passenger station where trains were passing, for the purpose of taking his own life. Such declaration, therefore, made an hour or any other space of time previous to the act of departure, itself would afford no light upon his intention, and could not be considered as evidence unless immediately con-

nected with the act of departure. In the case of *Lake Shore and Michigan Southern Railway Co. v. Herrick*, *supra*, the declaration was connected with the act of leaving the hotel. The declaration was not made in connection with any preparation for a space of time previous to the act of departure for the train, but was immediately connected with the act of departure itself. In the case at bar, at the time the declarations which were sought to be admitted as evidence were made, the decedent was getting her children ready for school and performing her ordinary household duties, and while so doing she declared an intention of going to the city of Chicago. This declaration was not connected with the act of departure itself, and was not admissible. To admit such declaration as constituting a part of the *res gestæ* would, on the same principle, hold admissible a like declaration made the day or a week before. Such declaration, therefore, made to the witness Stangnan, was not competent as part of the *res gestæ*, and it was error to admit it.

There is another error in this record also which must cause a reversal of this judgment. At the close of plaintiff's evidence a motion was made by defendant below to withdraw the case from the jury and instruct the jury to find for the defendant. The trial court took the motion under advisement until the following day and then refused it, to which appellant excepted. Two elements necessary for appellee to show in this case were, negligence on the part of appellant as charged in the declaration and which caused the death of appellee's intestate, and also that the deceased was herself, at the time of the accident, in the exercise of due care and caution for her own safety. If both these elements were not established the above motion made by defendant should have been allowed, and it was error to refuse it. In our view of this case neither of these important and necessary elements was established, nor was there evidence tending to prove either proposition. Before the freight train

in question was moved the proper signal was given by the conductor in charge, who stood near the decedent and saw that the track was open; a whistle was sounded and a bell rung; a brakeman was stationed on the end of a box car nearest where danger might be expected, if any, and the train moved at a slow speed,—perhaps no faster than a man ordinarily walks. The servants of appellant had no reason to suppose that when the train had approached within a few feet of this woman she would step upon the track in front of it. We know of nothing which appellant or its servants could have done, within reason, the omission of which shows negligence on their part. The decedent, on the contrary, was guilty of such negligence as contributed to her death. She had been at this station thirty minutes, where this train had been switching back and forth. The train had moved three hundred feet approaching the platform, and while part of this distance was on the cross-over track, at least one hundred feet was on the track where she finally stepped. The morning was clear and bright, and no objects intervened to prevent her seeing so large an object as a slowly and steadily approaching box car. Under all the circumstances she appeared to act in a manner so negligent as to indicate an utter disregard for her own safety, instead of exercising that due care and caution which would entitle appellee to recover. The motion made to instruct the jury to find for defendant should have been allowed.

For the errors indicated in this opinion the judgment is reversed and the cause remanded to the circuit court of Cook county.

Reversed and remanded.

MR. JUSTICE CARTER: I do not concur in the conclusion reached by the court in this case.

SNYDER BROS. *et al.*

v.

JOEL J. BAILEY *et al.**Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.*

1. POWER OF ATTORNEY—*by corporation, to confess judgment, need not be under corporate seal.* A corporation may, by its duly authorized officers, execute promissory notes of the company with warrants to confess judgment thereon, and the presence of the corporation seal, though it implies authority, is not essential to their validity.

2. SAME—*sufficiency of power executed by corporation to authorize clerk to enter judgment.* A warrant of attorney to confess judgment on a corporation note, regular on its face and signed by officers who may lawfully execute the same if so authorized, is *prima facie* valid, and the circuit clerk may enter judgment thereon in vacation without proof of the authority for its execution. (*Matzenbaugh v. Doyle*, 156 Ill. 331, distinguished.)

3. PRACTICE—*proper papers to be filed on confession of judgment.* A warrant of attorney to confess judgment being valid on its face, the only papers necessary to be filed with the circuit clerk to authorize him to enter judgment are a declaration stating plaintiff's cause of action, the warrant of attorney, with proof of its execution, and a plea of confession.

Bailey & Co. v. Snyder Bros. 61 Ill. App. 472, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. JOHN J. GLENN, Judge, presiding.

Snyder Bros., a corporation organized under the laws of this State, doing business at Galesburg, Ill., as retail dealers in notions and general merchandise, became indebted to appellees in the sum of \$752 and in certain sums to other persons and corporations. On January 2, 1894, it executed to the first National Bank of Galesburg its promissory note for \$2400; to S. Spear & Son another for \$263.28; to John Ridley a third for \$1077.43; and to Prince & Welsh, its attorneys, still another for \$250 for attorneys' fees,—all of the notes being made payable on

165	447
174	236
73a	63
74a	442
165	447
176	226

165	447
89a	1258

165	447
112a	811

demand, with a power of attorney to confess judgment thereon in term time or vacation, in the usual form, and signed "Snyder Bros., by A. W. Snyder, President and Treasurer of said corporation; A. A. Sigsbee, Sec'y." On the same day judgments were entered up upon each of these notes before the circuit clerk of Knox county for the several amounts due thereon, a proper declaration and *cognovit* being filed with him, and also affidavits of the execution of the powers of attorney, in substance as follows: "That the plaintiff's demand is for (stating the nature of the demand;) that he is acquainted with the handwriting of the said defendant, Snyder Bros., by A. W. Snyder, president and treasurer of said corporation, and A. A. Sigsbee, secretary of said corporation, the maker of the annexed note and power of attorney, and that the said signature is the genuine signature of the said Snyder Bros., a corporation, and that the said demand is for a *bona fide* debt *bona fide* due," etc. On these judgments executions were immediately issued, and levied upon all the tangible property of the corporation. Power to execute these judgment notes had been given said officers of the corporation by resolution of its board of directors, although none of them were executed under the seal of the corporation. On the same day of their execution the same officers made an assignment to Prince & Welsh of all the book accounts of the company, with directions to collect and receipt for the same, and out of the proceeds first pay their fees, and apply the balance on the judgments named and return the surplus to the corporation. The goods levied upon were advertised for sale by the sheriff on the 18th of January, and on that day appellees, as creditors of the corporation, filed their bill in the circuit court of Knox county, asking to have the judgment set aside and a receiver appointed to close up the business of the company, making it, and the stockholders and judgment creditors above named, defendants thereto. On that day notice was served on each of the

defendants that on the 20th of the month an application would be made for an injunction. The sale was postponed to the next day, and before the hour fixed for the sale summons was duly served on each of the defendants. The corporation thereupon executed a bill of sale of the stock of goods to the four judgment creditors, and the executions were ordered returned. The judgment creditors immediately sold the goods to one Meyer, for the express consideration of \$3000, and turned over the bill of sale to him. On April 17 Prince & Welsh were appointed receivers by the circuit court, and they were ordered to collect the book accounts of Snyder Bros. and hold the money subject to the order of the court. On July 31, Prince & Welsh, as assignees of the book accounts, under the assignment of the company, filed an inventory and bond as assignees, in the county court, and proceeded to administer the assigned property.

Upon a hearing the court dismissed the bill and refused to set aside the judgments and refused to appoint a receiver. On appeal to the Appellate Court for the Second District that order was reversed and the cause remanded to the circuit court, with directions to proceed to settle the affairs of the company in accordance with the prayer of the bill, except as to the book accounts, the settlement of those accounts being left to the county court. From that judgment the present appeal is prosecuted.

J. A. MCKENZIE, and PRINCE & WELSH, for appellants:

Authority to give judgment notes may be presumed from circumstances. *Hier v. Kaufman*, 134 Ill. 215; *Burch v. West*, id. 258.

A seal is not a necessity to a note by a corporation. Its only office would be to import authority to the extent of making out a *prima facie* case. *Truett v. Wainwright*, 4 Gilm. 411.

When the affidavit is filed showing the execution of the power of attorney, the duties of the clerk are ministerial only, and he has no discretion but to enter up the judgment. *Roundy v. Hunt*, 24 Ill. 598; *Tucker v. Gill*, 61 id. 236.

CHARLES S. HARRIS, and E. J. KING, for appellees:

The seal of a corporation is *prima facie* evidence of the assent of the corporation. *McDonald v. Chisholm*, 131 Ill. 281; *Bills v. Stanton*, 69 id. 51; *Railroad Co. v. Morgenstern*, 103 id. 149; *Wood v. Whelen*, 93 id. 153; *Reed v. Bradley*, 17 id. 321; 1 Beach on Private Corp. sec. 376; *Joliet Electric Light Co. v. Ingles*, 23 Ill. App. 45.

Where a judgment is confessed in vacation, all evidences necessary to its validity should be filed and preserved with the record. In the absence of a corporate seal there should be filed and preserved in the record some evidence of the authority of the president and secretary of a corporation to execute warrants of attorney to confess judgments. *Matzenbaugh v. Doyle*, 156 Ill. 331; *Roundy v. Hunt*, 24 id. 598; *Adams v. Printing Co.* 27 Ill. App. 313; *Joliet Electric Light Co. v. Ingles*, 23 id. 45; *Tucker v. Gill*, 61 Ill. 236; *Durham v. Brown*, 24 id. 94; *Martin v. Judd*, 60 id. 78; *Gardner v. Bunn*, 132 id. 403; *Stine v. Good*, 115 id. 93.

The entering of a judgment in vacation by confession is a statutory proceeding, and the clerk is authorized to act only in cases affirmatively appearing to be within the statute. *Gardner v. Bunn*, 132 Ill. 403; *Roundy v. Hunt*, 24 id. 598; *Rising v. Brainard*, 36 id. 79; *Tucker v. Gill*, 61 id. 236; *Bannon v. People*, 1 Ill. App. 496.

The clerk, in all cases and in all his official acts, whether in term time or in vacation, performs his duties as a ministerial officer. *Ling v. King*, 91 Ill. 571; *Durham v. Brown*, 24 id. 93; *Tucker v. Gill*, 61 id. 236; *Conkling v. Ridgely*, 112 id. 36; *Gardner v. Bunn*, 132 id. 403; *Roundy v. Hunt*, 24 id. 598.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The bill of complainants below is based upon the theory that the confessed judgments are void, and it is in effect admitted that if they are not, the decree of the circuit court was right. It is, we think, well settled, at least in this State, that a corporation, by its president, treasurer or secretary, if authorized to do so, may execute promissory notes of the company with warrants of attorney to confess judgments thereon. If they are executed under the seal of the corporation by such officers their authority to execute them will be presumed. It has been held by this court that warrants of attorney to confess judgments need not be under seal in order to be valid, and the effect of our decisions is, that the authority of officers of a corporation to execute its judgment notes need not be shown by the corporate seal. In fact, it is conceded in this case that the corporate seal was not essential to the validity of these notes.

The position of counsel for complainants below is, that inasmuch as the judgments were confessed in vacation, before the clerk, (a mere ministerial officer,) there must have been filed with him some evidence of the authority of the officers to execute the powers of attorney. This position is based upon *Stein v. Good*, 115 Ill. 93, and other cases, to the effect that judgments by confession in vacation being wholly *ex parte*, and the papers filed constituting a part of the record without being preserved in a bill of exceptions, the record should show, unequivocally, that the power of attorney was executed by the defendant, and holding that where no affidavit or other proof of the execution of the power is filed with the clerk the judgment will be a nullity. The argument seems to be that the proof must show, not only that the warrants of attorney were executed by officers of the company, but also that they had authority from the company to do so,—and to that effect is the decision of the Appellate Court, based mainly upon *Matzenbaugh v. Doyle*, 156 Ill. 331.

That was an action at law on an alleged confessed judgment. The note on which the judgment was confessed showed on its face that it was barred by the Statute of Limitations. We have given careful consideration to the position, and the arguments of counsel in support thereof, and are unable to give our assent thereto. The question decided in the *Matzenbaugh* case is clearly distinguishable from the one raised here. The case is not in point.

We held in *McDonald v. Chisholm*, 131 Ill. 273, that the authority of an officer of a corporation to execute its judgment notes might appear from all the facts and circumstances surrounding the transaction,—in other words, that the authority might be implied, although there was no express action of the corporation conferring it; and to the same effect is *Atwater v. American Exchange Bank*, 152 Ill. 605. The principle upon which an officer of a corporation can bind it by making its promissory notes, with or without a warrant of attorney to confess judgment, is that of agency. An agent can execute such contracts only when authorized to do so; but the fact of agency appearing, and the papers being shown to have been duly executed, we do not understand it to be necessary, in the first instance, that proof of the authority must be made upon confession of judgment. It is true, if it should turn out that authority did not exist the judgments would be void, not because the proof of authority was not filed with the clerk, but because of the absence of authority. In this case it is admitted that the board of directors of the corporation had, by its resolution, conferred power upon those officers to do just what they did do. The filing of the affidavit that that resolution had been passed, or the filing of a copy of the resolution, in our judgment would have added nothing to the validity of the judgment. Certainly, no one not a party to that judgment would have been bound by any *ex parte* proof of that kind. Suppose a party holding the judgment note of a corporation, executed by its president or other

officer, seeks to take judgment thereon in vacation, where the authority of the officer to execute the warrant of attorney is implied from the manner in which the officer has dealt for the corporation; would it be claimed that in such case the plaintiff or holder of the note must file with the clerk the evidence upon which he relies as showing such authority? We think not.

The law applicable to warrants of attorney by corporations to confess judgments is conceded by both parties to be, that the officers of the company can only bind it by their act in executing the warrants when authorized to do so, and that such authority will be implied where the execution is under the corporate seal. If the power is duly signed by officers who, under the law, may execute the same if authorized to do so, and no seal of the corporation is used, the power of attorney is still valid, provided the authority to execute it exists. The question in this case may therefore be said to be, are the warrants of attorney upon which these judgments were confessed valid upon their face, or is it necessary, in order to make them *prima facie* valid, that the seal of the corporation or other evidence of authority to execute them should appear? We think the warrants, being executed by officers recognized by the law as proper persons to do so if authorized, there being nothing to show such authority or the absence thereof, are *prima facie* valid. We do not think it can be seriously contended that these powers of attorney are void upon their face, because to so hold would be to say that powers of attorney to confess judgment could only be executed by corporations under their corporate seal, and for this we are unable to find any authority. The power of attorney being *prima facie* valid, then, under the authority of *Roundy v. Hunt*, 24 Ill. 598, (cited and followed in *Gardner v. Bunn*, 132 id. 403,) the only papers necessary to be filed with the clerk were a declaration by the plaintiff on his cause of action, the warrant of attorney with proof of its execution, and a plea

of confession. As said in *Roundy v. Hunt, supra*: "These, under the practice, constitute the proper papers to authorize the confession of a judgment."

For the reasons stated we are of the opinion that the judgments entered in vacation were valid, and that the action of the circuit court in dismissing the bill of complainants to set them aside was proper and the judgment of the Appellate Court in reversing its decree erroneous. It will accordingly be reversed, and the cause will be remanded to the circuit court with directions to again dismiss the bill.

Reversed and remanded.

Mr. JUSTICE CARTWRIGHT took no part.

MITCHELL H. WILCOXON *et al.*

v.

THOMAS D. WILCOXON.

Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.

1. APPEALS AND ERRORS—*Supreme Court will not disturb verdict in will contest when evidence is conflicting.* When the evidence given on either side in a suit contesting a will is such that, uncontroverted, it would justify a finding for either party, the Supreme Court will not disturb the verdict of the jury, even though, as an original proposition, it might entertain a different view.

2. WILLS—*mere persuasion, however importunate, does not constitute undue influence.* Mere persuasion or advice concerning the execution of a will or deed will not, however importunate, justify setting aside such will or deed on the ground of undue influence.

3. SAME—*bill to set aside will can be maintained only by an interested party.* A bill to set aside a codicil cannot be maintained when the will to which the codicil is attached, and which is recognized by the bill as valid, disposes of the entire estate to parties other than the complainant, so that he cannot be practically benefited, directly or indirectly, by the success of his suit.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. J. H. CARTWRIGHT, Judge, presiding.

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198	85
165	454
194	85

165	454
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This is a bill by defendant in error, against plaintiffs in error, to set aside a codicil to the last will of Thompson Wilcoxon, deceased, and also to set aside a deed by the said Thompson Wilcoxon and wife conveying certain real property to plaintiffs in error.

Complainant in the bill and the defendants Mitchell H. Wilcoxon, Mary D. M. Proctor and Martha E. Lemon are the only children of Thompson Wilcoxon, deceased, and the defendant Cyende Wilcoxon is his widow. In August, 1852, Thompson Wilcoxon executed his last will and testament, in and by which he gave all his property, real and personal, in law or equity, of which he should die seized, to his wife, Cyende Wilcoxon, without any condition or qualification whatever. On the third day of January, 1881, he executed the codicil sought to be set aside. Upon his death, in December, 1887, the will and codicil were duly admitted to probate in the county court of Stephenson county. On the 20th of June, 1881, the testator and his wife, Cyende, executed and delivered to three children, Mary D. M. Proctor, Mitchell H. Wilcoxon and Martha E. Lemon, a warranty deed to certain real estate, in consideration of a nominal sum and love and affection. That deed was filed for record in the recorder's office of said Stephenson county in January, 1888. Subsequently to the probating of the will the complainant, Thomas D. Wilcoxon, filed this bill, seeking to set aside the codicil and the probate thereof, and also the deed, upon the ground that at the time of their execution Thompson Wilcoxon was of unsound mind and memory, and that he executed said instrument through the undue influence of the defendants. The joint and several answers of the defendants admitted the execution of the several instruments and the probate of the will and codicil, but denied that they were invalid, and denied that at the time of their execution Thompson Wilcoxon was not of disposing mind and memory, and denied that he was in any way influenced by them to execute the same.

An issue was made up on the allegations of the bill, answer and replication, as to whether the writing purporting to be the codicil to the last will and testament of Thompson Wilcoxon, deceased, was the codicil to said will or not, and this issue was tried before a jury, resulting in a verdict finding that it was not such codicil. Motion for new trial being overruled, a decree was entered in accordance with the finding, setting aside said codicil and declaring it of no force and effect. Thereafter the issue as to whether the deed was invalid was tried before the chancellor, he considering all evidence introduced before the jury pertinent to the latter issue, and both parties introducing a large volume of additional evidence. On this hearing a decree was entered declaring the deed null and void, to which finding an exception was entered. This writ of error brings before us the proceeding below upon both of these hearings, and seeks a reversal of both decrees.

J. A. CRAIN, for plaintiffs in error.

WILLIAM BARGE, for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The ground mainly relied upon by plaintiffs in error for reversal is, that the evidence fails to sustain the finding below. On the issue as to the validity of the codicil the defendants introduced the probate thereof and a large volume of documentary evidence, together with the testimony of some forty witnesses, neighbors, associates and acquaintances of Thompson Wilcoxon, extending over a period of many years prior to the execution of the codicil as well as over the years of his life thereafter, which witnesses testified, with more or less directness, that in their opinion Wilcoxon was capable of transacting the ordinary business affairs of life before, at the time and after the execution of the codicil. The documentary evidence consists of letters written by him in person, bearing date

from April, 1879, to perhaps December, 1881. These letters were written to his relatives. Other testimony consisted of certain articles of agreement and papers relating to business transactions, which were perhaps written by others but entered into by him. These contracts also covered a period from April, 1879, to about the time said codicil was executed, and they relate to contracts for the building of houses in the city of Freeport. The complainant introduced a large number of witnesses bearing substantially the same relationship to the testator as did those introduced by the defendants,—that is, neighbors, associates and acquaintances,—who gave it as their opinion that he was not of sound mind and memory. While the evidence of many of these witnesses on either side is of very little importance, either by reason of the limited opportunities they had of forming an opinion or because of the indefiniteness of that opinion, there is such testimony on either side as, uncontroverted, would justify a finding either for or against the complainants, and therefore if this case depended upon the weight of that oral testimony alone, this court, under a long line of well considered cases, would not disturb the finding and decree below, even though we might, as an original proposition, entertain a different view from that reached by the jury. There is, however, in this case, as we think, such evidence of intelligence and business capacity in letters written by the testator and by business transactions shown to have been entered into by him, as to make it clear to our minds that he was capable of transacting the business affairs of life. It is undisputed that before, and for several years, at least, after, the execution of this codicil he continued to transact business with the same intelligence manifested by him in the former periods of his life, and he was recognized, so far as this evidence shows, by business men, contractors, bankers, insurance companies and others with whom he came in contact, as a business man, the same as he had always been. It is

perhaps true that after he moved from Freeport to near Chicago many of his business transactions in Freeport were looked after by his son Thomas; but that was not because of his incapacity to attend to his affairs, but because of his absence.

Some reliance is placed by the complainant's counsel upon the fact that certain of the witnesses spoke of the old gentleman having received a partial stroke of paralysis in the spring of 1879, and an effort is made to date his mental derangement from that time. We have carefully considered all the evidence bearing upon that theory, and while it is true that he was sick at that time, confined to his bed for a short period and lingered about his house, and while it may also be true that that sickness was the result of a partial stroke of paralysis, the evidence is convincing that he so far recovered from its effect as to become remarkably healthy and vigorous for a man of his age, both mentally and physically.

But it is insisted that the evidence shows that the codicil was executed by the over-persuasion of the defendants; that one or more of them procured it to be prepared, and afterwards executed, without the uninfluenced desire and will of the old gentleman. It does appear that some one of the defendants first called upon a relative and attorney at law, Charles H. Mitchell, whose office was in the city of Chicago, and informed him of a desire on the part of the testator to make a codicil to his will like that which is here in controversy, and that Mitchell then gave such party a rough draft of the same; that subsequently the old gentleman, and perhaps his wife and one or more of the other children, went to the office of Mitchell, where the testator signed the codicil, and it was duly witnessed by the said Mitchell and one Jesse B. Barton. We think, when Mitchell's testimony is fully considered, it proves no sort of undue influence, but establishes the fact that Thompson Wilcoxon executed the codicil freely and voluntarily, fully understanding its

scope and purport and giving a rational motive for executing it. He testifies that at the time it was executed no one was immediately present, and that Wilcoxon explained fully his reasons for making it, which, as appears from the codicil itself, grew out of the fact that a relative, Abigail Wilcoxon, had willed to him and his heirs a considerable estate, and as he might die before she did, or as she might conclude to change her will and give the property to one or more of his children, he desired that an equal distribution among all his children should be made, taking into consideration that estate, whatever it might be. It has often been decided by this court, as well as others, that mere persuasion or advice, however importunate, will not justify the setting aside of a will. (*Dickie v. Carter*, 42 Ill. 376; *Yoe v. McCord*, 74 id. 33; *Sturtevant v. Sturtevant*, 116 id. 340.) Here we think the most that can be said, from all the evidence bearing upon that subject, is, that the daughters, Mrs. Proctor and Mrs. Lemon, or one of them, rendered more or less assistance to their father in making this codicil, but there is not, so far as we have been able to find, a particle of evidence to the effect that they ever requested, much less unduly influenced, him to make it; and to hold that the act was not his own voluntary one would be but an inference from what was done, which we think is wholly unjustifiable.

But it is said that the testator, by his own declarations, admitted that he was influenced to make the codicil, and it is true that witnesses testified that in conversation with him about the matter he did express regret at cutting off his son Thomas, and said, in effect, that he was induced to do so by others; but in the same connection, at least with a part of these witnesses, he showed what these influences were which induced him to do it, and clearly expressed the fact that he was induced to do so because of what had been done, or what he feared might be done, by Abigail M. Wilcoxon in the disposition

of her estate. Giving full force and effect to all that class of testimony, we cannot hold that it constitutes undue influence, within the meaning of the law. Our conclusion therefore is, that the verdict of the jury on the issue as to the codicil was unauthorized by the evidence and should have been set aside.

Coming now to the question as to the validity of the deed, there is no evidence in this record that there was any undue influence whatever used by any one to induce the making of that deed. In fact, there is no evidence even tending to show that the defendants, other than the widow, who joined in its execution, knew that it was executed at the time or had anything whatever to do with its execution. The same witness, Charles H. Mitchell, took the acknowledgment to the deed as a notary public, which is in the usual form. He was asked no questions whatever about its execution or the circumstance under which it was made. To sum up the evidence bearing upon this question would be to repeat what we have already said in regard to the execution of the codicil to the will. It seems to us that the evidence as to the grantor's ability to make that deed at the time of its execution is overwhelmingly in favor of its validity, and we are therefore of the opinion that the chancellor erred in his finding and decree upon that branch of the cause.

Independently of what we have said, we are unable to see upon what theory it can be held that the complainant in this bill has any standing whatever in a court of equity. His bill recognizes the validity of the will of 1852. That will, as we have already said, in the most comprehensive and unequivocal terms gives to Cyende Wilcoxon, absolutely and unconditionally, all the property of every description of which the testator should die seized. The codicil only purports to express a further desire in the disposition of his estate if his wife, Cyende, should die before he did, and expressly re-affirms the bequest made in the original will. In other words, the force and effect

of the codicil depended wholly upon the fact as to whether or not the wife should survive him. The bill itself alleges that she did survive him, and she is made a party thereto. How, then, can it be said that the execution of this codicil in any way affected the rights or interests of Thomas D. Wilcoxon, the complainant below? Certainly it interferes in no way with any devise or legacy which he may receive from Abigail M. Wilcoxon, because if he receives any such devise or legacy he does so through her will, and independently of any act of his father. If it be said that the codicil obstructs his right to receive an interest in his father's estate, the answer is that that estate is wholly disposed of by the original will vesting it in the widow, Cyende Wilcoxon. So as to the deed. When Thompson Wilcoxon died, that moment, under the provisions of his will, all his real estate, both in law and in equity, vested in his devisee, Cyende Wilcoxon, his wife. If this decree should stand, holding that deed void and of no effect, who is the owner of the land? Certainly not the heirs of Thompson Wilcoxon, because by a will, the validity of which is not questioned, it is given to the widow. It certainly will not be denied that upon affirmance of the decree below vacating and annulling that deed she might instantly convey it to the same children—dispose of it by will; or, if she should die intestate, it would descend to her heirs. In any view, Thomas D. Wilcoxon has no interest whatever in this litigation, and can practically receive no benefit, directly or indirectly, from the decrees below, and for that reason, as well as because they are not supported by the evidence, they will be reversed and the cause remanded to the circuit court, with directions to dismiss the bill.

Reversed and remanded.

Mr. JUSTICE CARTWRIGHT took no part.

JABEZ W. WARD

v.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Filed at Ottawa November 23, 1896—Rehearing denied March 12, 1897.

1. **NEGLIGENCE**—*the question of negligence arising upon conflicting evidence is for the jury.* Where the question of negligence arises upon such a state of facts that reasonable men might fairly arrive at different conclusions, the fact of negligence cannot be determined until one of these conclusions has been drawn by a jury.

2. **CARRIERS**—*railroad must use due care in stopping coach at platform.* A railroad company, having provided its stations with platforms, must use due care in stopping its coaches so as to afford passengers an opportunity to safely alight thereon, particularly after its servants have announced that the next stop would be at a station.

3. **SAME**—*when passenger may recover for injury received in alighting from train.* A railroad passenger who is justified by the conduct of the servants of the road in alighting from a train, and who, while exercising due care, is injured by reason of the carrier's negligence in omitting to provide a safe place to alight, may recover for the injuries so received.

4. **SAME**—*what duties a carrier does not owe to passenger.* As an independent proposition of law a carrier owes no duty to a passenger to keep the vestibule doors of its coaches closed, or the vestibules lighted, or its grounds away from a station lighted and free from obstructions.

Ward v. C. & N. W. Ry. Co. 61 Ill. App. 530, reversed.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DeKalb county; the Hon. CHARLES KELLUM, Judge, presiding.

CHARLES A. BISHOP, THOMAS M. CLIFFE, and PEASE & McEWEN, for plaintiff in error:

Negligence is a question of fact for the jury. *Railroad Co. v. Yarwood*, 15 Ill. 468; *Railroad Co. v. Randolph*, 53 id. 514; *Railway Co. v. Halsey*, 31 Ill. App. 601; *Railroad Co. v. Bonifield*, 104 Ill. 223; *Delmatyr v. Railroad Co.* 24 Wis. 585; *Railroad Co. v. Baddeley*, 150 Ill. 328; *Coal Co. v. Bruce*, id. 449; *Railroad Co. v. O'Hara*, id. 580; *Cressey v. Railroad Co.*

75 Pa. St. 83; *Davis v. Railroad Co.* 18 Wis. 175; *Filer v. Railroad Co.* 49 N. Y. 47; *McNulta v. Ensich*, 134 Ill. 53; *Railroad Co. v. O'Connor*, 119 id. 586; *Railroad Co. v. Voelker*, 129 id. 540; *Railroad Co. v. Moranda*, 108 id. 576; *Railroad Co. v. Pennell*, 94 id. 449; *Schmidt v. Railroad Co.* 83 id. 405; *Wolf Manf. Co. v. Wilson*, 152 id. 9.

Where the facts are such that reasonable men might disagree as to whether or not an act constituted negligence, it cannot be said by the court to be or not to be negligence, but must be left to the jury upon the proofs, as a question of fact, for their determination. *Railroad Co. v. Parker*, 131 Ill. 557; *Railroad Co. v. Voelker*, 129 id. 540; *Railroad Co. v. O'Connor*, 119 id. 586; *Railroad Co. v. Johnson*, 135 id. 641; *Railroad Co. v. Davis*, 130 id. 146; *Railroad Co. v. Lane*, id. 116; *Railroad Co. v. Ouska*, 151 id. 232; *Hoehn v. Railroad Co.* 152 id. 224; *Railroad Co. v. Larson*, id. 327; *Railroad Co. v. Brown*, id. 484; *Andrew v. Railway Co.* 45 Ill. App. 269; *Railway Co. v. Callaghan*, 157 Ill. 406.

The effect of calling stations is a question of fact. 2 Am. & Eng. Ency. of Law, 761; *Railway Co. v. Farrell*, 31 Ind. 410.

WILLIAM BARGE, for defendant in error:

It is not carelessness in a conductor to notify passengers of their approach to the station at which they are to get off. 2 Redfield on Railways, (5th ed.) 262; *Damont v. Railway Co.* 6 La. Ann. 441.

The mere announcement of the name of the station is not an invitation to alight. *Smith v. Railway Co.* 88 Ala. 538.

Neither the announcement of the station, nor stopping the train before it arrives at the platform, if required by law or usage for the purpose of avoiding collisions or other accidents, is negligence *per se*. *Smith v. Railway Co.* 88 Ala. 543.

Alighting from a train in motion precludes a recovery, and the use of reasonable care while alighting does not help it. *Railroad Co. v. Dufraim*, 36 Ill. App. 352.

If a company has prepared a platform for the accommodation of passengers leaving the cars, and a passenger leaves the cars on the opposite side and is killed in consequence, the company is not responsible. Redfield on Carriers, sec. 390; *Railway Co. v. Zebe*, 33 Pa. St. 318.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Plaintiff in error brought his action against defendant in error, in the circuit court of DeKalb county, to recover damages for a personal injury received from the alleged negligence of its servants. The circuit court sustained a demurrer to the declaration, and upon his electing to abide by it, entered judgment against him for costs. He appealed to the Appellate Court for the Second District, and that court affirmed the judgment of the circuit court, to reverse which judgment of affirmance this writ of error is prosecuted.

The declaration is very voluminous, containing eleven counts of unusual length. While the demurrer was both general and special, the special grounds stated go to the substance, and not to the form, of the allegations. Admitting, as it does, the truth of the allegations of the declaration properly pleaded, the question for our decision is, do the several counts, or any of them, state such a cause of action as entitles the plaintiff to recover? If it does, then whether, under all the facts of the case, with their proper inferences, there appears such negligence as will entitle the plaintiff to a judgment must be submitted to a jury for determination. As stated by COOLEY, C. J., in *Detroit and Milwaukee Railroad Co. v. Van-Steinburg*, 17 Mich. 99: "When the question arises, and upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence can not be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and uncontrovertible, or they cannot be decided upon by the

court." This court has frequently announced the same doctrine.

The *gravamen* of the action is, that the plaintiff, being by the defendant carried as a passenger from Chicago to DeKalb, was induced to believe, by the announcement of a brakeman on the train, that it had stopped at DeKalb station, under which belief he attempted to get off, using due care, and was, from different causes stated in the several counts, thrown to the ground and injured, the train, in fact, having stopped about three hundred feet short of the station. Each count, except the first, (and perhaps the seventh, which is so general as to be clearly bad,) states this principal cause of action in the same language, as follows: The defendant, "in announcing, by its servants, the stations at which the said train stopped and was to stop, announced, upon leaving each station stopped at prior to reaching said city of DeKalb, that the next station stopped at would be the station next on the route and at which said train was scheduled to stop, which announcement was the only announcement of stations made by the said railroad by its servants in the said coach in which the said plaintiff was riding which could be heard by passengers within said coach seated at or near where the plaintiff was then and there riding; and the plaintiff avers that the * * * defendant, by its brakeman, announced on the said train, upon leaving a certain station called Geneva, situated in the State of Illinois, and by and through which the line of railroad upon which said train was operated ran, that the next stop of the train would be DeKalb, meaning thereby the station of the defendant situated in the city of DeKalb; * * * that the said defendant ran and operated its said train to a point near the said station of DeKalb, and stopped the same a distance of * * * three hundred feet from said station before reaching the same, and which stop was the first stop of the said train after leaving the said station of Geneva, near the said

station of DeKalb; that upon the stopping of said train, the same being about the hour of eight o'clock P. M., * * * and it being dark, the said plaintiff, together with other passengers, proceeded to the end of the coach in which he was then and there riding nearest to the seat occupied by him, for the purpose of ascertaining if the said train was in fact at the station of DeKalb and if it were safe for him then and there to alight, and if said train had passed said platform to endeavor to get the servants of the defendant on said train to stop and permit plaintiff to alight, there being no servants of the defendant then and there in said car; * * * and plaintiff further avers that immediately after the stopping of the train the defendant started the same, without notice or warning to plaintiff that said train had not reached said station of DeKalb." Then, after alleging that it was the duty of the defendant to keep the doors of the vestibule closed, the vestibule lighted, the place where the train stopped lighted, etc., (these alleged duties being stated in separate counts,) it is alleged that the plaintiff proceeded to the platform of said car, and then and there, while exercising due care and diligence, stepped from the threshold of the door or went upon the platform, and missed his footing by taking hold of a swinging vestibule door, or for want of proper light, or falling over piles of gravel, etc., fell, and was injured, etc.

It will thus be seen that the statements as to obstructions, want of light, improper condition of the vestibule doors, etc., are merely matters explanatory of the manner in which the defendant was thrown to the ground, and are only material provided it is sufficiently shown that he was justified in attempting to alight from the car at that place,—that is to say, it was not, as a matter of law, the duty of the defendant to keep the doors of the vestibule closed, the vestibule lighted, the ground near the track at that particular place free from gravel and kept lighted, etc., as an independent proposition. As a matter of law

the plaintiff had no business to go upon the platform of the car, or right to attempt to leave it at a place other than the station, unless he was led to do so by some act of the employees of the defendant reasonably calculated to mislead him as to where the station was, and therefore it was a matter of no consequence to him whether the doors of the vestibule were closed, the vestibule lighted or the yard free from obstructions or not. On the other hand, if he was justified in attempting to alight from the train at that place, and failed to do so safely, exercising due care, and his injury was caused by reason of any of the omissions or obstructions, then he would be entitled to recover, independently of such omissions or obstructions. So the question upon each of these counts must be, does it appear that he was reasonably justified in attempting to get off at the time alleged?

The negligence charged is, stopping the train before reaching DeKalb station, after the announcement upon leaving Geneva, without warning to passengers not to get off. The distance between Geneva and DeKalb is not stated nor the length of time required to make the run between these stations. We do not think any intelligent person would understand the call of the brakeman upon leaving Geneva, as alleged, as requiring passengers to leave the train at the next stop without further notice. It is well known that calling the next station in the manner alleged is merely to enable passengers to get ready, if they desire time to do so, to get off when the station is called and the train stopped. Each of these counts shows, by direct averments, that the plaintiff was not led to believe he was to get off at the first stop after leaving Geneva. When the stop was made he "proceeded to the end of the coach in which he was then and there riding, * * * for the purpose of ascertaining if the said train was in fact at the station of DeKalb and if it were safe for him then and there to alight," and yet he proceeds to show, by subsequent averments, that, notwithstanding

the train immediately started after stopping, without any further information he attempted to get off the train. Why he left the car or attempted to do so, and whether he attempted to get off while the train was still standing or after it had started, is not alleged. We will have occasion to notice the law applicable to the case in our consideration of the first count, and deem it unnecessary to more definitely point out objections to those above mentioned, but we think it clear, when read in the light of the law, that they state no grounds of recovery. They are vague, indefinite and uncertain in the extreme, and the circuit court very properly held each of them bad.

We are, however, unable to reach the same conclusion as to the first count. It alleges that the plaintiff became a passenger on the defendant's road from the city of Chicago to the city of DeKalb, and avers that it was the duty of the defendant, upon the arrival of the train at his destination, to properly stop the train to give him an opportunity of safely alighting therefrom, and then states that it failed to perform that duty, in this language: "But on the contrary thereof, then and there, upon the approach of the said train to said station, and after the passengers thereof had been notified of the near arrival of said train at said station by the calling thereof by the brakeman of the company, stopped the train prior to reaching the said station, and the plaintiff then and there proceeded upon the platform of said coach in which he was then and there riding, the same being then and there in darkness, and so dark that the plaintiff could not see whether or not the said train had arrived at the said station, and the defendant then and there suddenly, carelessly and negligently moved the said train without warning to the plaintiff, and the said platform of said coach was then and there unsafe and dangerous, and the defendant then and there, negligently and carelessly, failed to warn said plaintiff that said train was not at the station platform, and while the plaintiff, with all due care

and diligence, was then and there preparing to alight therefrom, the said plaintiff, by and through the carelessness and negligence of the defendant in moving said train, without warning to said plaintiff, as aforesaid, was then and there thrown with great force and violence from and off the said train to and upon the ground there and the rails of another track of the said defendant then and there situated, and then and there injured." The count then proceeds to state the nature of his injuries.

The language is not the most apt and the expressions perhaps not entirely clear, but we think any one reading this count would understand its averments to be, that upon the approach of the train to DeKalb station the brakeman called it out, but the train, instead of stopping at the station, stopped about three hundred feet before reaching it, whereupon the plaintiff proceeded to get off, and in doing so was injured. Hutchinson, in his work on Carriers, speaking of the duty of railroad companies as to providing suitable opportunity for passengers to safely alight from their trains, says: "Having provided such platforms, they are required to be careful to bring their coaches up to them in such manner that their passengers may be afforded an opportunity safely to alight upon them, and if the passenger be called upon to leave the coach before this has been done, or if he is reasonably induced to believe, from the circumstances or from the conduct of those in management of the train, that it has been halted in order that the passengers might there alight, and that no other or better opportunity will be given him to do so, and in undertaking to leave the conveyance with due care and discretion he receive an injury from the want of proper facilities for doing so or by reason of the dangerous character of the ground, the carrier will be held responsible for its negligence." And in support of this announcement a number of English cases are cited.

In the case of *Memphis and Little Rock Railway Co. v. Stringfellow*, 44 Ark. 322, (51 Am. Rep. 598,) the plaintiff was a passenger on the defendant's road. When the train had arrived within a short distance of the destination the brakeman called out the name of the station. The train stopped a few moments at a crossing of another road, short of the station. The night was dark. The plaintiff, thinking he had reached the station, arose from his seat and attempted to get off just as the train was beginning to move slowly forward, and was injured. It was held he was entitled to recover. Several English and American cases are quoted from as sustaining the cause of action, among others, *Weller v. London, etc. Railway Co.* L. R. 9 C. P. 126. In that case BRETT, J., says: "I agree that to call out the name of the station before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine driver has overshot the station and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn the passengers not to alight. At all events, the jury may, from the facts, infer negligence." And it is also said, "the best considered American cases are to the same effect."

In *Central Railroad Co. v. VanHorn*, 38 N. J. L. 133, BEASLEY, C. J., said: "The court would not be warranted in saying that it is not negligence to give notice of the approach of a station and then to stop the train short of such station in the night time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night this must be the inevitable result. It is said in the brief of the counsel for defendant that it was right to give the notice at a long distance from the depot, so that the passengers might

prepare to leave the cars. This may do when the train is not to stop before it reaches the station. When the station is called the passengers have the right to infer that the first stop of the train will be at such station."

In a note to the foregoing case it is said (51 Am. Dec. 602): "In *Bass v. P. & W. R. R. Co.* (R. I. Sup. Ct.) the train on which A was approaching his home stopped before arriving at the station to allow a freight train coming in the opposite direction to pass. It was dark. A, thinking that the station was reached, got out and was injured by the freight train. The conductor, as soon as he learned the cause of the stop, moved his train forward to the station. It was in evidence that passengers at the station habitually left the train on both sides. A sued the railroad company for damages and recovered a verdict. *Held*, that the question of the defendant's negligence and of plaintiff's contributory negligence was for the jury."

We are unable to see, under these authorities, wherein the first count of this declaration is substantially defective in stating a cause of action. Of course, the question upon the trial must be whether or not, in view of the facts alleged and the inferences to be fairly drawn therefrom, the plaintiff was justified in believing, from the statements and conduct of those in charge of the train, that it had stopped at the proper place for him to alight at DeKalb station, and whether he was in the exercise of ordinary care and diligence in attempting to do so, being thrown from the train by the sudden moving thereof without notice.

For the reasons stated the judgments of the circuit and Appellate Courts will be reversed, and the cause will be remanded to the circuit court.

Reversed and remanded.

Mr. JUSTICE CARTWRIGHT took no part.

ADELBERT W. OLDS

v.

THE NORTH CHICAGO STREET RAILROAD COMPANY.

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

BILLS OF EXCEPTION—*judge may sign duly presented bill of exceptions after time for filing has expired.* Where a bill of exceptions has been duly presented to a judge within the time allowed, he may sign and seal the same, though not done until after the time fixed by the order and also after the term of court at which judgment was entered.

North Chicago Street Railroad Co. v. Olds, 64 Ill. App. 595, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

CONSIDER H. WILLETT, for appellant:

When the time to file the bill of exceptions has expired, as also the term of court in which the judgment was entered, the court has no jurisdiction to sign and seal a bill of exceptions. *Hake v. Strubel*, 121 Ill. 321; *Burst v. Wayne*, 13 id. 664.

The power of the court exists to extend the time in which to file a bill of exceptions, but the term at which the judgment was entered having expired, such extension can be granted only within the time in which the court had given permission to file the bill of exceptions. *Marseilles v. Howland*, 136 Ill. 84; *Patterson v. Stewart*, 104 id. 104; *People v. Gary*, 105 id. 264; *Hawes v. People*, 129 id. 123; *Railroad Co. v. People*, 106 id. 652; *Gorski v. Featherstone's Sons*, 55 Ill. App. 368; *Dickey v. Bruce*, 21 id. 445.

EGBERT JAMIESON, and JOHN A. ROSE, for appellee:

If the appellant presents his bill of exceptions to the trial judge within the time prescribed by law, he will not be prejudiced if the judge does not sign the bill until

after the time allowed has expired. *Magill v. Brown*, 98 Ill. 235; *Underwood v. Hossack*, 40 id. 98; *Hyde Park v. Dunham*, 85 id. 570; *Hawes v. People*, 129 id. 123; *Ferris v. Bank*, 158 id. 237; *Stein v. Kendall*, 1 Ill. App. 101; *Railroad Co. v. Morrison*, 160 Ill. 288.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This case originated in the Superior Court of Cook county. The action is by the appellant, against the appellee, for an alleged injury to one of his hands, caused by being forcibly ejected from a street car of the defendant by the conductor. The question of fact in dispute between the parties was whether or not the plaintiff was a trespasser upon the car, the theory of the defense being, that owing to his drunken and filthy condition of person he was not entitled to be taken and carried upon the car with other passengers. He was first put off the car or prevented from entering it without force, but immediately got back on the platform and attempted to remain there or force his way into the car, and resisted being put off by clinging to the car railing, the injury resulting to his hand by the conductor forcing him off. Upon the first trial he obtained a judgment, which was reversed by the Appellate Court, (see 40 Ill. App. 421,) and the cause was remanded. Upon the second trial he again recovered judgment, and the defendant appealed. In the Appellate Court counsel for plaintiff entered his motion to strike the bill of exceptions from the files, upon the ground that at the time it was signed the judge had no jurisdiction to do so. That motion was overruled and the judgment of the trial court reversed without remandment, and hence this appeal.

It seems that the judgment was rendered February 1, 1896, and the appeal then prayed, with leave to file a bill of exceptions within twenty days from that date. On February 18 an order was entered extending the time for filing the bill of exceptions five days, and a similar order

was entered on the 21st of the same month. These orders, it is admitted, cannot be reasonably construed as extending the time beyond March 2, 1896. The bill of exceptions concludes: "Signed this 4th day of March, as of the 21st day of February, A. D. 1896.—James Goggin, Judge, etc. (Seal.)" And it was filed March 4, 1896, as of February 22. Endorsed upon the bill of exceptions appear the words: "Presented in open court this 21st day of February, A. D. 1896.—James Goggin, Judge."

It is insisted by counsel for appellant that the time allowed to file the bill of exceptions had expired, and that as the term of court at which the judgment was obtained had also expired, the court had no jurisdiction to sign and seal the bill of exceptions,—relying upon *Hake v. Strubel*, 121 Ill. 321, and cases there cited. In this case, however, as shown by the endorsement of the judge, the bill of exceptions was presented within the time allowed, and although the judge did not then sign and seal it, or do so until after the time fixed for its presentation, the signing and sealing were not without jurisdiction. It was held in *Underwood v. Hossack*, 40 Ill. 98, that although the bill of exceptions appeared not to have been actually filed until some time after the time allowed in which to file it, yet the party having presented it to the judge within the time prescribed for its being filed, he had complied with the rule so far as it was in his power to do so, and that he could not be prejudiced because the judge had failed to actually sign it until after the time limited had expired, and it was said: "The judge having signed this bill of exceptions, we will presume that he would not have done so unless it had been presented to him in proper time." Here, as we have seen, that presumption is made certain by the endorsement of the judge. To the same effect are *Village of Hyde Park v. Dunham*, 85 Ill. 569, *Magill v. Brown*, 98 id. 235, *Hawes v. People*, 129 id. 123, *Ferris v. Commercial Bank of Chicago*, 158 id. 237, and *West Chicago Street Railroad Co. v. Morrison*, 160 id. 288. We think

the Appellate Court properly overruled the motion to strike the bill of exceptions from the files.

On the merits of the case, the questions of fact as to whether the plaintiff was a trespasser and properly excluded from the car, and whether excessive force was used in putting him off, are settled by the decision of the Appellate Court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY *et al.*
v.
EZRA F. ANNIS.

Filed at Ottawa November 9, 1896—Rehearing denied March 9, 1897.

1. TRIAL—*statements are ineffectual as objections unless ruled upon by court.* The statement "I desire the record to show that I object to these remarks," addressed by an attorney to the court with reference to remarks of opposing counsel, is ineffectual as an objection unless pressed upon the attention of the court and its ruling obtained thereon.

2. SAME—*improper remarks of attorneys before the jury—new trial.* Where the attempts of a trial court to restrain the efforts of an attorney to obtain a verdict by making remarks outside the evidence, calculated to prejudice the jury, are ineffectual, the fruits of such unprofessional conduct should be taken away by granting a new trial.

3. APPEALS AND ERRORS—*granting new trial for improper remarks to jury is within trial court's discretion.* Whether a new trial should be granted because of improper remarks claimed to have prejudiced the jury, rests in the sound discretion of the trial court, and in the absence of abuse thereof courts of review will not interfere.

West Chicago Street Ry. Co. v. Annis, 62 Ill. App. 180, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

186 475
67a 636
68a 458
165 475
70a 670
165 475
171 441
165 475
80a 396
165 475
82a 189

165 475
108a *888
165 475
207 *408
110a 15
165 475
115a *251

This is an action on the case by appellee, against appellants, to recover damages for personal injuries alleged to have been caused by the joint negligence of their employees. The declaration consists of two counts, the first charging that while the plaintiff was walking on Clark street, in the city of Chicago, at the crossing of Randolph street, a horse car operated by the West Chicago Street Railroad Company, going east on one track, and a cable car operated by the North Chicago Street Railroad Company, going west on another track, were so negligently operated by those in charge of said cars, that plaintiff was caught and crushed between them. The second count alleges the negligent construction of the tracks of said companies by placing them in such close proximity to and parallel with each other as that it became and was dangerous and unsafe to operate and run cars upon and over the same, and especially so when cars were operated and hauled upon and over them in opposite directions; that the said companies, in operating the said cars upon their tracks moving in opposite directions, so negligently ran the same that plaintiff, exercising due care in crossing Randolph street, was caught between such cars and thereby crushed, etc.

It appears from the evidence that on May 11, 1892, appellee was going north on Clark street, and in attempting to cross Randolph street, there being a number of trucks and other obstructions on the street, he stepped in the rear of one of the trucks upon the cable track, in front of a grip car moving west, but just as he did so the gripman, and perhaps a policeman also, gave the alarm, and he jumped back out of the way of the grip, and as he did so was passed by the horses attached to the horse car, going east, thus being caught between the two cars moving in opposite directions, and thereby, as he claims, injured. The cars on either track were what are called box-cars, and the tracks were so constructed that these cars, when passing each other, were but about ten inches

apart. The grip car was moving at the usual rate of speed and the horses to the other car were going in a trot. There was a considerable amount of confusion at the crossing occasioned by the traffic upon the streets, and more or less difficulty to foot passengers in crossing. A fuller statement of the facts will be found in the case reported in 62 Ill. App. 180, but the foregoing will suffice for the purposes of this opinion.

On the trial in the circuit court plaintiff recovered a judgment against the defendants jointly, for \$15,000 and costs of suit, which has been affirmed by the Appellate Court.

EGBERT JAMIESON, and JOHN A. ROSE, for appellants.

C. E. CRUIKSHANK, and FRED H. ATWOOD, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

A considerable part of the argument of counsel for appellants is devoted to an effort to show that the evidence failed to prove due care by the plaintiff and negligence on the part of the defendants, and that the damages are excessive. It would be a waste of time to show that we have no jurisdiction to review either of these questions. Counsel admit that these and all other controverted questions of fact have been conclusively settled against the appellants by the judgment of the Appellate Court, and the only reason given for the discussion in this court is, that it tends to strengthen the position that the verdict was the result of prejudice, produced in the minds of the jury by improper remarks of one of plaintiff's attorneys. These remarks, and objections thereto made at the time, are stated at length in the opinion of the Appellate Court, *supra*, and need not be repeated here. Some of them were clearly improper, and we fully concur in all that is said in condemnation of attempts on the part of attorneys to obtain verdicts by inflaming the passions or

appealing to the prejudices of the jury. The question here, however, is, can it be said the trial court committed reversible error in any of its rulings on that branch of the case? To one of the statements counsel for defendants objected, and the objection was sustained, the court directing the jury to disregard it, and another of plaintiff's attorneys announcing that the remarks were withdrawn. At another time counsel for defendants said: "If the court please, I desire the record to show that I object to these remarks," but no ruling of the court was asked or made on that or any other objection than as above stated. In *Marder, Luse & Co. v. Leary*, 137 Ill. 319, to a remark of an attorney to the jury the opposing counsel said, "I except to that statement," and it was held that the exception meant nothing in a legal sense, it being said: "The court had made no ruling to which it was applicable, and if it was intended to be an objection, it was ineffectual because it was not pressed upon the attention of the judge and his ruling obtained thereon." To the same effect is *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, and *Pike v. City of Chicago*, 155 id. 656.

No more delicate question for decision can arise than the propriety of the conduct of counsel in the trial of cases, and it is gratifying to know that the sense of professional propriety is generally such that courts seldom need interfere. When, however, the necessity arises, trial courts should not hesitate to use their authority to restrain all efforts of attorneys to obtain verdicts by using unfair means, and making remarks outside of the evidence calculated only to arouse the prejudice and passions of the jury; and whenever such restraining influences do not effect the purpose, the fruits of such unprofessional conduct ought to be taken away by granting a new trial. It is, however, as held in the *Cotton case*, *supra*, a matter resting in the sound discretion of the trial judge to say when, under all the circumstances of the case, and in view of the counter remarks which may be made and

the temper and character of the jury, whether a new trial should be granted or not, and unless it satisfactorily appears from the record that the trial court has abused its discretion in this regard courts of review cannot interfere. Applying this rule to the facts of this case we can not say that the trial court committed error in refusing to grant a new trial because of the misconduct of plaintiff's counsel, and especially as the question is not presented so as to be reviewed here, under the authorities above cited.

The only other ground of reversal urged is the refusal of the trial court to admit in evidence an ordinance authorizing the laying of the tracks of the defendants. We are unable to see in what way that ordinance became material or competent as evidence in the case. If, as a matter of fact, it was negligence for the defendants to lay their tracks in the manner authorized, the authority of the city to do so would be no justification in an action against them for such negligence. Plaintiff's case, however, is not based upon the negligent act of laying the tracks of the defendants. According to the declaration the injury resulted from the negligent manner in which the cars were operated over the tracks,—that is to say, the approximate cause of the injury was the negligent running of the cars in view of the crowded condition of the street and other surrounding circumstances. The ordinance, therefore, was wholly foreign to the issue and was properly excluded.

This disposes of all the questions presented by the argument of counsel, and, as we have seen, no reversible error has been shown. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MARTIN C. WALTON *et al.*

v.

SALLY M. FOLLANSBEE *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.

1. EVIDENCE—*when abstract of title is inadmissible under the Burnt Records act.* An abstract of title is incompetent, under section 24 of the Burnt Records act, (Laws of 1887, p. 261,) to prove that a deed was recorded prior to the destruction of the records, unless the deed itself is lost or destroyed.

2. SAME—*parol evidence is inadmissible to vary the terms of an unambiguous express trust.* Where the language used in a trust deed is sufficiently clear to enable the court to ascertain the terms and duration of the trust created, parol evidence is inadmissible to vary or explain its terms or limitations.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This case was before us in 1889, and will be found reported in 131 Ill. 147. Upon being remanded to the circuit court the suit was dismissed as to plaintiff VanPelt, and again tried. One of the attorneys for the plaintiffs made affidavit that both parties claimed title through a common source—Nelson C. Walton. The death of Eliza Ann Walton was proved, and that the plaintiffs, with the daughter Josephine, (since deceased,) were her only children.

The trust deed from Nelson C. Walton to George Walton and Margaret E. Young, dated March 24, 1858, and copied at length in the former opinion, was introduced in evidence, and from the endorsement thereon it appeared it was not filed for record in the recorder's office of Cook county until November 23, 1891. Plaintiffs offered to show, by an abstract of title made prior to the destruction of the records of the county, that it had in fact been recorded May 1, 1858, but the evidence was, on objection of counsel for the defendants, excluded as incompetent. Plaintiffs then introduced the other trust

deed referred to in our former opinion, dated October 12, 1859, in which Nelson C. Walton, George W. Walton, Austin Walrath and Margaret E. Walrath (wife of Austin Walrath, formerly Young,) were parties of the first part, and Isaac G. Wickersham and Sidney Abel parties of the second part, and Eliza Ann Walton party of the third part, conveying the lot in question. That deed recites:

"Whereas, by deed dated March 24, 1858, and recorded in book 152, page 236, said Nelson C. Walton did convey to said George W. Walton and Margaret E. Young certain real estate in trust for the use and benefit of said Eliza Ann Walton; and whereas, it was also provided in said deed that said trustees should, at any time, execute such conveyance of said real estate as the said third party should, in writing, request: Now, therefore, in consideration of the premises, the said Eliza Ann Walton requesting the execution of this conveyance by her signature hereto affixed, in pursuance of the provisions of said deed and one dollar, the said first parties have sold, released and conveyed to said second parties, and to the survivor of them, and to the heirs or assigns of such survivor, lot 44, block 4, Fort Dearborn addition to Chicago, (and other property,) to have and to hold to said parties of the second part, and to the survivor of them, and the heirs or assigns of such survivor, forever in trust, and for the following purposes," etc.

The remaining part of the deed is a literal copy of the one of March 24, 1858, except in providing that the parties of the second part shall execute leases, etc., instead of the words "leases, conveyances, contracts and agreements in reference to said premises," the language "leases deeds, mortgages, conveyances, contracts or agreements *embracing or affecting* said premises" is used. Both deeds contain the declaration, "and in case of her decease before said Nelson C. Walton the property above described shall descend to and vest in her children, and in default of children surviving, shall revert to said Nelson C. Wal-

ton. In case of the decease of said Nelson C. Walton before said party of the third part the said premises shall become the absolute property of said party of the third part, and the trust lien created shall thereupon cease and determine." The last named deed was filed for record January 5, 1860. The defendants offered in evidence the deeds mentioned on page 154 of the Illinois Supreme Court Report above referred to.

Instructions asked by the parties were refused and others given by the court of its own motion.

HARVEY B. HURD, FREDERICK C. HALE, and E. P. HILLIARD, for appellants.

T. A. MORAN, and T. J. WALSH, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The first question presented for decision is, did the circuit court err in excluding the offered evidence to prove that the deed of 1858 was recorded? The abstract, if competent at all, was made so by section 24 of the Records act. (2 Starr & Curtis, p. 2002.) But that section only provides for the introduction of an abstract of title in evidence when it shall be stated, on oath, that the originals of any deeds or other instruments in writing, etc., "are lost or destroyed or not within the power of the party to produce the same, and that the records thereof are destroyed by fire, or otherwise." No such preliminary proof was or could have been made here, because the original deed was in the possession of plaintiffs and offered in evidence. It was not error to exclude the offered evidence.

There is greater force in the contention that defendants were chargeable with notice of that deed, and the record thereof, by the recital contained in the one of October 12, 1859, under which they claim. The only ground upon which it is claimed they are not so chargeable is,

that the recital does not sufficiently identify that deed. When the whole recital is considered there is but little ground for conjecture that another deed may have been referred to.

But in our view neither of the foregoing questions is of controlling importance in the decision of the case. It will be seen from the above statement that plaintiffs did not rely wholly upon the original deed, but also offered in evidence the one of October 12, 1859. Among the instructions asked by them and refused were the following:

7. "The jury are instructed that neither Nelson C. Walton, or either set of trustees, or Mrs. Walton, together or alone, had the right, under the deeds in evidence, to convey away the fee of the lot in question as against the rights of the plaintiffs in this case."

9. "The jury are instructed that the effect of the deed from Isaac G. Wickersham, Sidney Abel, Nelson C. Walton, Eliza Ann Walton and Josephine M. Walton was to vest in their grantee, Elbridge G. Walton, and his grantees, only an estate for the life of Eliza Ann Walton, and upon her death all the rights derived by them under such deed to the lot in question came to an end."

By the instructions given the jury were told that the plaintiffs based their claim upon the deed of March 24, 1858, and the defendants theirs upon the one of October 12, 1859, and that "the defendants, or the parties under whom they claim, * * * have no actual or constructive notice of the said first deed of March 24, 1858, except in so far as the conditions and provisions contained therein are recited in the second deed dated October 12, 1859, claiming that the said deed of March 24, 1858, was never recorded among the records of this county until 1891, and several years after this suit was instituted."

After explaining that parol evidence had been received as to the value of the property, its rental value, its value as a life estate, the financial condition of the parties, their whereabouts, and other surrounding cir-

cumstances, for the purpose of enabling the court to construe the deeds, and that the same were not to be considered by the jury, instructions were given construing the first deed (March 24, 1858,) in conformity with our decision *supra*, but the jury were instructed that if they believed, from the evidence, that that deed was not recorded "before the date of the record of said deed of December 1, 1861, to Elbridge G. Walton, and that the defendants, or those under or through whom they claim, had no actual or constructive notice thereof, then the defendants are not bound by said first deed, except in so far as the recitals thereof appear in the said second deed dated October 12, 1859, and the deed of December 1, 1861, conveyed the fee simple title to the lot in controversy to said Elbridge G. Walton, and the deed from the said Elbridge G. Walton and wife to Martin Clifford conveyed to him a good and absolute title in fee simple."

Clearly the deed of October 12, 1859, does not materially differ from that of March 24, 1858, as to the legal estate vested in the trustees. Providing in it that the parties of the second part should deed and mortgage the premises at the request of the party of the third part added nothing to the same provision in the former deed. "Such conveyances," as used in both, clearly includes both deeds and mortgages. We said in the former decision (131 Ill. 157): "In considering the provisions of said deed for the purpose of determining the scope and extent of the trust, it seems too plain for argument that the parties intended to create a trust which should subsist only during the joint lives of Nelson C. Walton and his wife. This is evident from language which is too plain to require construction. It was expressly provided that in case of the death of Eliza Ann Walton leaving her husband surviving her, the property in said deed described should descend to and vest in her children, or in default of children, that it should revert to her husband, the grantor. It was further provided that in case of the

death of Nelson C. Walton before the death of his wife said premises should become the absolute property of his wife, and that said trust should thereupon cease and determine. It is true the instrument requires the trustees to execute such leases, conveyances, contracts and agreements in reference to said premises, or any part thereof, as Mrs. Walton should, in writing, request; but this clause must be construed with proper reference to the other provisions above mentioned. A deed should be so construed, if possible, as to give force to all its provisions, and there is no difficulty in construing the clause last mentioned so as to give it effect and at the same time give full force and effect to all the other provisions of the deed. The 'leases, conveyances, contracts and agreements' there referred to must obviously be construed to mean leases, conveyances, contracts and agreements of and concerning the estate which was made the subject matter of the trust, viz., an estate in the lots conveyed for the joint lives of the grantor and his wife. Such construction does no violence to the language employed, and makes said clause harmonize perfectly with those clauses of the deed which provide for the disposition of the property in the event of the death of either the grantor or his wife. If, on the other hand, the deed is so construed as to give the trustees power and make it their duty to convey the fee, or any interest extending beyond the joint lives of the grantor and his wife, the disposition attempted to be made of the property upon the death of either of said parties would be rendered nugatory and of no effect."

Can it be seriously contended this language is less applicable to the deed of 1859 than that of 1858, there under consideration? The language in the one is literally that of the other. To say, therefore, that the trustees could convey the fee under the last deed but could not under the first, would be absurd.

An attempt is made by counsel for appellees to escape this dilemma and avoid the force of the former decision by insisting that the parol evidence offered upon this trial as to the value of the property and as to the circumstances and surroundings of the parties justified the court in construing the conveyance of October 12, 1859, as vesting the fee in the trustees, with power to convey the same. If that were true it would be a matter of no consequence which deed appellees claimed under. If the parol evidence authorized the construction of the second deed placed upon it, why not apply the same evidence to the first, and give it the same construction? In the first place, parol evidence was incompetent to vary or change the express terms of the deed. We said before, speaking of the declaration of the trust for the 'joint lives, only, "this is evident from language which is too plain to require construction." The trust is an express one, and to be valid must be manifested and proved by some writing. (1 Starr & Curtis' Stat. sec. 9, chap. 59, p. 1200.) We have found the language used by the grantor sufficiently clear to enable us to ascertain the terms and duration of the trust declared. There is no theory, then, upon which the parol testimony introduced can be held competent. (1 Perry on Trusts, sec. 76.) Proof of circumstances surrounding the parties and the property could not be received to vary the terms, conditions and limitations of the deed, but as to these the instrument must speak for itself. (2 Parsons on Contracts, 549.) But if it were otherwise, we do not think the contemporaneous facts and circumstances proved are so far inconsistent with the language of the instruments as to manifest a different intention from that there expressed.

In this view, the court below erred in refusing to give the seventh and ninth instructions asked by the plaintiffs, and also, in effect, instructing the jury that unless defendants were chargeable with notice of the first deed, the deed from "the said Elbridge G. Walton and wife to

Martin Clifford conveyed to him a good and absolute title in fee simple."

The judgment of the circuit court must accordingly be reversed, and the case will be remanded, with instructions to that court to proceed in conformity with the views here expressed.

Reversed and remanded.

JAMES S. EVERTS *et al.* Admrs.

v.

A. B. LAWTHER.

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. APPEALS AND ERRORS—*reversal without remanding does not infringe right of trial by jury.* The reversal of a cause upon the facts by the Appellate Court, without remanding, is not an infringement of the constitutional right of trial by jury, particularly where that right was waived below and a trial had before the court alone.

2. SAME—*correctness of the law applied by Appellate Court is reviewable by Supreme Court.* Whether facts exist which, under correct rules of law, would fix the rights of the parties, is a question upon which the finding of the Appellate Court is conclusive in suits at law, but whether that court applied correct rules of law to the facts so found is a reviewable question.

3. PRINCIPAL AND AGENT—*agent's powers are limited to the scope of his agency.* A general agent for the loaning, collecting and re-loaning of money does not have, as incidental to his employment, power to substitute himself as creditor in the place of his principal.

4. SAME—*debt to a principal is not discharged by giving note payable to his agent.* The unauthorized acceptance of a note payable to himself by an agent employed to loan and collect money, in satisfaction of a debt due to his principal, does not discharge the debtor from liability, in the absence of ratification.

Lawther v. Everts, 63 Ill. App. 432, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

165	487
173	506
72a	636

165	487
175	44

165	487
178	419

165	487
179	153

165	487
184	161

165	487
96a	4849

GEORGE W. HALL, for plaintiffs in error:

Inasmuch as the entire merits of this case turn upon the question of the scope of an agent's authority, and is therefore a mixed question of law and fact, the entire record and evidence are before this court for consideration. Story on Agency, sec. 105; *Haines v. Publishing Co.* 20 Ill. App. 574; *Insurance Co. v. Beaver*, 26 id. 349; *Furniture Co. v. Chapman*, 54 id. 122; *Gregg v. Wooliscroft & Co.* 52 id. 221.

A general agent is one who is authorized to transact all of his principal's business, or all of his business of some special particular kind. *Furnace Co. v. Keystone Manf. Co.* 110 Ill. 427.

Power to act generally in a particular business, or a particular course of trade in a business, however limited, constitutes a general agency, if the agent is so held out to the world, however restricted his private instructions may be. *Crain v. Bank*, 114 Ill. 516.

Our present constitution (art. 2, sec. 5,) says: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Section 2 of the same article says: "No person shall be deprived of life, liberty or property without due process of law." These sections, in effect, affirm the right of trial according to the process and proceedings of the common law. *Bullock v. Geomble*, 45 Ill. 222; *Rhinehart v. Schuyler*, 2 Gilm. 517; *Heacock v. Hosmer*, 109 Ill. 250; *Ward v. Farwell*, 97 id. 612; *Mascall v. Drainage Comrs.* 122 id. 625; *Spooner on Trial by Jury*, 125.

An agreement to waive a jury only binds the parties to the mode adopted, of trial by the court, to that one on trial. *Carthage v. Buckner*, 8 Ill. App. 154.

The power to collect and loan money as the agent deems best includes power to extend time of payment. *Hurd v. Marple*, 2 Ill. App. 402.

Where one of two innocent persons must suffer by the misconduct of a third person, that party shall suffer who, by his own acts and conduct, has enabled such third per-

son, by giving him credit, to practice a fraud or imposition upon the other party. Story on Agency, secs. 56, 127.

MANN, HAYES & MILLER, for defendant in error:

The finding of the Appellate Court conclusively settles every question of fact, both principal and evidentiary, the character, force and effect of the testimony, and all inferences and deductions to be drawn from the evidence in the record. Rev. Stat. chap. 110, secs. 88, 90; *Bridge Co. v. Highway Comrs.* 101 Ill. 518; *Stock Yards v. Ferry Co.* 102 id. 514; *Fitch v. Johnson*, 104 id. 111; *Powell v. McCord*, 121 id. 330; *Bank v. Bank*, 131 id. 547; *Alphin v. Working*, 132 id. 488; *Waldron v. Alexander*, 136 id. 550.

An assignment of error not noticed or argued in the brief of the party assigning the same will be considered as waived. *Seaton v. Ruff*, 29 Ill. App. 235; *Railway Co. v. VanVleck*, 40 id. 367; *McDaneld v. Logi*, 143 Ill. 487; *Railway Co. v. Stout*, 47 Ill. App. 546.

In appeals from or writs of error to the Appellate Court the Supreme Court simply reviews the rulings of the Appellate Court, and will not consider any question not raised in that court. *Aurora v. Pennington*, 92 Ill. 564; *Hyslop v. Finch*, 99 id. 171; *Redlich v. Bauerlee*, 98 id. 134; *Thayer v. Peck*, 93 id. 357; *Bank v. LeMoyne*, 127 id. 253.

Where a jury has been waived and the cause submitted to the court, the Appellate Court may reverse the judgment of the trial court on a finding of facts, refuse to remand the case for another trial, and enter final judgment. Starr & Curtis' Stat. chap. 110, secs. 81, 88; *Lumber Co. v. Bank*, 143 Ill. 490.

Where a reviewing court has the power to render the judgment which ought to have been rendered by the court below, it will do so, and not send the case back. *Prince v. Lamb*, Breese, 378; *Wilmans v. Bank*, 1 Gilm. 667.

An agent or attorney authorized to collect negotiable paper for his principal or client cannot accept anything but money in payment, unless he has been expressly au-

thorized by his principal or client to receive something else. *Scott v. Gilkey*, 153 Ill. 168; *Robinson v. Anderson*, 106 Ind. 152; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Padfield v. Green*, 85 id. 529; *Graydon v. Patterson*, 13 Iowa, 256; *Drain v. Doggett*, 41 id. 682; *Kenny v. Hazeltine*, 6 Tenn. 62; *Sweeting v. Pearce*, 97 Eng. C. L. (7 C. B.) 448.

An agent, although authorized to receive payment in part, cannot, upon such payment or in consideration of it, extend the time of payment of the balance. Nor can he extend the time, without express authority, in any case. *Mechem on Agency*, sec. 378; *Austin v. Thorp*, 30 Iowa, 376.

An agent having authority to collect the debt cannot be supposed to have the right to take as payment the note of the debtor payable to himself, thus substituting himself as creditor in the room of his principal. *Robinson v. Anderson*, 106 Ind. 152.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Defendant in error filed his claim in the probate court of Cook county against the estate of Edward A. Everts, deceased, and upon the claim being disallowed appealed to the circuit court, where the case was again tried. The claimant was again unsuccessful, and the circuit court rendered judgment against him for costs.

At the trial in the circuit court the following facts were agreed upon: From 1887 until his death, on April 17, 1894, Charles W. Griggs was the Chicago agent of A. B. Lawther, the claimant, a resident of Syracuse, N. Y., and during said period Lawther sent to Griggs, at various times, sums of money aggregating a large amount, all of which he authorized Griggs to loan upon notes and other securities to be approved by said Griggs. During said period Griggs continued to handle and loan money for Lawther, and was authorized to collect the interest and principal of the notes and securities on which loans were made. Among other loans for Lawther he loaned

\$2000 to Edward A. Everts, taking said Everts' note for the amount, dated October 28, 1892, payable to Lawther ninety days after date, with interest at seven per cent. When the note matured Everts paid to Griggs, in a check and cash, \$1018.08,—half of the amount due,—and gave a new note for a like sum, payable in ninety days to the order of Griggs, who thereupon canceled the original note and delivered it to Everts. Griggs discounted the note at the Commercial National Bank, and received in cash for it \$1000.67. At the maturity of the note so discounted, Everts paid it to the Commercial National Bank. There was also evidence introduced by the defendants consisting mainly of correspondence between Lawther and Griggs, and testimony as to the usual course of business of Griggs in conducting his agency.

An appeal was taken from the judgment of the circuit court, and the Appellate Court reversed it and entered judgment for \$1248.19 and costs, to be paid in due course of administration. This judgment was based upon a finding of facts made a part of the judgment, as follows: "And the court now finds, that January 21, 1893, the appellees' intestate, Edward A. Everts, was indebted to the appellant in the sum of \$1018, upon his, the said Everts', promissory note to the appellant, which became due that day, and bearing seven per cent interest, and that for that sum the said Everts gave to one Charles W. Griggs, who was the agent of appellant, his, the said Everts', promissory note, payable ninety days after date to Griggs himself, which note the said Everts afterwards paid to the said Griggs, who never paid the money to appellant; that the taking of such note to Griggs was without the knowledge, consent, authority or ratification of the appellant."

The merits of the case depend upon the scope of Charles W. Griggs' authority as the agent of defendant in error, and it is claimed by plaintiffs in error that, as a mixed question of law and fact, the entire record and

evidence are before this court for its consideration and determination, notwithstanding the finding of facts by the Appellate Court. It is a question of law what facts will operate to give an agent power to bind his principal in dealing with a third person, but the existence of such facts is a question for the jury. The decision, therefore, whether the act of Griggs in taking a note payable to himself in payment of an obligation due to his principal was or was not binding upon the principal, turns upon the existence or non-existence of facts which, under the rules of law, would confer power upon the agent. Upon such a question the jury receives the law which limits or controls the rights of the parties, from the court and applies them to the facts. Where a question of that kind has been passed on by the Appellate Court its decision as to the facts must be accepted as final, and this court has no right to review it. *St. Louis Stock Yards v. Wiggins Ferry Co.* 102 Ill. 514.

The question whether the Appellate Court, in rendering its judgment, applied correct principles of law to the facts found is a matter of law, and that question is still open in this court. The question to be considered here is, whether the above finding of facts justified the judgment entered. *Hawk v. Chicago, Burlington and Northern Railroad Co.* 147 Ill. 399; *Borg v. Chicago, Rock Island and Pacific Railway Co.* 162 id. 348.

An agent employed to collect a debt cannot, by virtue of his employment, merely, accept a note payable to himself in discharge of the debt, (*Scott v. Gilkey*, 153 Ill. 168,) and under the finding of facts there was neither express authority conferred upon Griggs, nor knowledge, consent or ratification of the act by his principal. It was found as a fact that Griggs was the agent of defendant in error, and it is contended that the above rule did not apply to his agency on account of the general character of such agency, which embraced loaning money for his principal, and collecting and managing the loans in whatever way

he deemed best. But even such an agent does not possess all the power and authority over the property of his principal which such principal possesses and may exercise. The powers of the agent are limited to the general scope of the business entrusted to him, and a general agent for the purpose of loaning and collecting money and re-loaning does not have, as incidental to that employment, a right to substitute himself as the creditor. Such an act is certainly not within the scope of the authority confided to a general agent for the purpose stated.

The act of Griggs being without the knowledge or consent of his principal, there could be no ground for the claim that he had misled Everts in dealing with the agent. Everts was bound to know the law in that regard, and must be considered as having trusted to the good faith of Griggs that he would pay the money to the defendant in error, rather than to have supposed that his note made to Griggs was an actual payment to the defendant in error. The judgment of the Appellate Court was a necessary consequence of the facts found.

Complaint is also made because the Appellate Court entered final judgment and did not remand the case to the circuit court for a new trial. It is argued that plaintiffs in error were thereby deprived of their constitutional right to a trial by jury. They were not deprived of that right, for the reason that they waived it and submitted the case to the court for trial. In such a case the Appellate Court may give final judgment, if the law applied to the facts found authorizes such a judgment. *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE NORTH CHICAGO STREET RAILROAD COMPANY

v.

MARY A. SOUTHWICK.

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

1. EVIDENCE—*when not error to exclude evidence tending to impeach witness.* It is not error to refuse to allow a witness to testify to alleged admissions of a party to a suit for the purpose of impeachment, where it does not appear that the denial was made in the manner indicated by the questions propounded or where the matters referred to are not material.

2. APPEALS AND ERRORS—*objections not available on appeal unless ruled upon below.* That an attorney made improper remarks to the jury in his argument cannot be assigned as error on appeal, unless the remarks are objected to specifically when made, the objections ruled upon and exceptions preserved to adverse rulings.

3. PRACTICE—*noting exception avails nothing unless objection is made and ruled upon.* Neither the remarks, "I take exception to that statement," "Exception," etc., made by attorneys at trial, nor the remarks, "Let exception be noted," or "Note the exception," made by the court, are sufficient to show any error in the record on appeal, unless objections have been previously made and ruled upon adversely.

North Chicago Street Ry. Co. v. Southwick, 66 Ill. App. 241, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

SCHUYLER & KREMER, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Cook county, in favor of appellee, against appellant, for the sum of \$3000, for a personal injury alleged to have been received, while a passenger, from the negligence of the

servants on one of its street car lines. The theory of plaintiff's case, set up in the various counts of her declaration, is, that the car from which she was attempting to alight was suddenly jerked or started, throwing her to the ground, causing her injury. The principal controversy upon the trial was whether or not the car was suddenly jerked as alleged, and on that question numerous witnesses were examined by the respective parties.

It is contended by appellant that the verdict of the jury is contrary to the clear preponderance of the testimony, and some argument is adduced in support of that contention, seemingly ignoring the fact that this court is not at liberty to review the action of the Appellate Court in that regard.

It is insisted that the court erred in refusing to allow a witness named Aldrich to answer certain questions intended to impeach a witness for the plaintiff, John Southwick, her father. The object of the questions was to show that Southwick had made statements to Aldrich, which the former denied having made. It does not appear that Southwick did deny having made the statements to Aldrich in the manner indicated, by the questions propounded to him. Moreover, the questions were not as to facts material to the case. We think there was no error in refusing the proposed evidence.

The error most relied upon for a reversal of the judgment below is, that the court permitted counsel for the plaintiff to make improper remarks to the jury. We have examined that part of the record, and are of the opinion that, as said by the Appellate Court, while counsel did not confine his remarks to the proper limit of the facts of the case, no such objections, rulings of the court and exceptions were preserved as entitles the appellant to have that question ruled upon here. All that is shown is, that during the speech of counsel for the plaintiff to the jury one of the attorneys for the defendant repeatedly said, "I take exception to that statement," "Excep-

tion to that statement," and "Exception," etc., and to perhaps three of such remarks the court said, "Let the exception be noted," or "Note the exception." These remarks, both by counsel and the court, amounted to nothing as showing error in the record. The court made no ruling upon any objection to the statements of counsel. *Marder, Luse & Co. v. Leary*, 137 Ill. 319.

No reversible errors of law appearing in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY *et al.*
v.

ANNIE KENNEDY-CAHILL.

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

1. APPEALS AND ERRORS—*whether defendants were jointly negligent is a question of fact.* Whether there was evidence fairly tending to show negligence on the part of one of two joint defendants in a suit for personal injury is a question of fact for the jury, and is conclusively settled by the affirmance of the Appellate Court.

2. EVIDENCE—*of plaintiff's health before and after injury is admissible.* In a suit against a railroad company for a personal injury, the testimony of plaintiff's associates as to her appearance, health, disposition, etc., before and after the injury, is admissible, to be considered with the other evidence.

West Chicago Street Railroad Co. v. Cahill, 64 Ill. App. 539, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

EGBERT JAMIESON, JOHN A. ROSE, and D. W. MUNN,
for appellants.

DAVID J. WILE, for appellee.

Per CURIAM: This is an action by Annie Kennedy Cahill to recover damages for personal injuries alleged to have been sustained by reason of the joint negligence of the West Chicago Street Railroad Company and the North Chicago Street Railroad Company. The declaration alleges that on the 18th day of February, 1893, the plaintiff became a passenger on one of the defendant the West Chicago Street Railroad Company's Halsted street cars, and that when the car reached the southern end of the viaduct at Halsted and Sixteenth streets, the servants of said company negligently stopped the car and invited the plaintiff to alight, and while the plaintiff, relying upon such invitation, was attempting to alight therefrom, "the defendant the North Chicago Street Railroad Company, by its servants, negligently ran against the plaintiff with a north-bound car, and thereby caught the plaintiff between said north-bound car and the one from which said plaintiff was attempting to alight, in consequence of which the plaintiff was crushed between the two cars." At the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at the sum of \$2000. On appeal to the Appellate Court that judgment has been affirmed.

No error is assigned upon the giving or refusal of instructions, and no objection was made to the evidence offered upon the trial explanatory of the circumstances under which the accident occurred, nor is it claimed that there is no evidence tending to support the allegations of the declaration as to the negligent or wrongful acts of the servants of the defendant the West Chicago Street Railroad Company. It is, however, said that there is no evidence of negligence on the part of the North Chicago Street Railroad Company, and it is insisted that the judgment against the *two* defendants, jointly, was therefore erroneous. We do not regard the question as to whether there was any evidence fairly tending to show negligence on the part of the North Chicago Street Railroad Com-

pany as presented to this court for decision. The case was submitted to the jury upon all the facts and instructions given on behalf of the defendants, and its finding and the judgment of affirmance in the Appellate Court conclusively settle that as well as all other controverted questions of fact in the case. But if it were otherwise, it cannot be said that there is no evidence tending to prove, or from which it can be fairly inferred, that the driver on the North Chicago Street Railroad Company's car was not guilty of negligence in failing to see the plaintiff and stop his car in time to avoid the accident.

The only attempt to raise a question of law in this court is upon the ruling of the court in the admission of testimony. Certain witnesses who lived in the same house with the plaintiff, or were intimate associates, were asked questions, in substance, as to her appearance of health and disposition before and after the injury, and were allowed to answer, over the objection of counsel for the defendants. The evidence showed that she was injured to a greater or less extent at the time of the accident, that she was confined to her bed for several weeks thereafter in consequence of those injuries, and that she ultimately went to a hospital and was there treated for sickness which she claimed was occasioned by the injury received. It was a question for the jury whether the subsequent sickness was caused by that injury or resulted from other causes, and we are unable to see why her appearance before and after the injury was not relevant to that issue, to be given such weight as the jury might think it entitled to. No authority is cited by counsel in support of the contention that the testimony is incompetent, and we find no error in this regard.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

JOHN H. MUELLER.

165	499
110a	590
165	499
112a	825
165	499
118a	1277

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

1. EVIDENCE—*testimony that an event did not take place is not negative.* Where two classes of witnesses are of equal intelligence, have equal opportunities of knowing the facts and have had their attention directed thereto, then, although one class testifies that an event did take place and the other testifies that it did not, the latter cannot be regarded as negative testimony.

2. PRACTICE—*not the province of the court to instruct jury as to weight of testimony.* It is never the province of the court to tell the jury which class of conflicting testimony is entitled to be accorded the greater weight.

West Chicago Street R. R. Co. v. Mueller, 64 Ill. App. 601, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. EDMUND W. BURKE, Judge, presiding.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

JAMES B. McCracken, and ALBERT M. CROSS, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Cook county in favor of appellee, against appellant, for a personal injury. The alleged injury resulted from a collision between a grip-car of the defendant and an express wagon on which the plaintiff was riding, at the crossing of Madison street and California avenue, in the city of Chicago. The declaration consisted of three counts, the first charging the defendant with negligence in failing to sound a gong, the second in running its car at a high rate of speed, and the third charging both these acts of negligence, and

setting up that plaintiff's view was obstructed by standing cars on another track. The judgment was for \$5500.

On the trial before the jury there was a conflict in the evidence as to the alleged acts of negligence. The court, at the instance of the plaintiff, gave this instruction to the jury, which is assigned for error:

"The court instructs the jury, that when one or more witnesses testify to being present upon any occasion and that certain facts then took place, and other witnesses of equal credibility, having equal means of knowing what took place, testify that they were present on the same occasion and that such facts did not take place, then the testimony of the latter witnesses is not what is known as negative testimony, but it is entitled to be regarded by the jury as affirmative testimony, and in such case it is the duty of the jury to weigh all the testimony and give a verdict as the weight may preponderate to the one side or the other."

It is unquestionably the law, and has been frequently so announced by this court, that negative testimony is not entitled to the same weight as affirmative testimony, and the rule has been applied to cases in which one set of witnesses testified that a bell was rung or a whistle sounded and others stated they did not hear it, the testimony of the former being held of greater weight. We have also held that where the two classes of witnesses are of equal intelligence and have equal opportunities of knowing the fact, and their attention has been directed to it, then, although one testifies that the occurrence did take place and the other that it did not, the latter testimony is not to be treated as negative. (*Rockford, Rock Island and St. Louis Railroad Co. v. Hillmer*, 72 Ill. 235.) This instruction was doubtless intended to do no more than to give the jury a rule for weighing the testimony of witnesses whose evidence might be regarded of a negative character, and while it is justly subject to the criticism of being argumentative, taken as a whole we are not able

to see that it could have misled the jury to the prejudice of appellant. Whether the testimony of the witnesses swearing that the gong was not sounded should be treated as negative in no way depended upon whether other witnesses testified that it was sounded, and the instruction was perhaps liable to be understood by the jury as an intimation from the court that the testimony of a witness of the one class was entitled to the same weight as that of a witness of the other class, and so understood would be erroneous. It is never the province of the court to tell the jury which class of conflicting testimony is entitled to the greater weight. (*Rockwood v. Poundstone*, 38 Ill. 199; *Rockford, Rock Island and St. Louis Railroad Co. v. Hillmer*, *supra*.) We think, however, taken as a whole, fairly and intelligently construed, it amounted to no more than telling the jury that if there was a conflict in the evidence of the witnesses as to whether a fact existed or not, it was the duty of the jury to weigh all the testimony and give a verdict as the weight might preponderate to the one side or the other. Sixteen instructions were given at the instance of the defendant, and they fully instructed the jury as to the requirement of the law that the plaintiff could only recover by proving his case as alleged, by a preponderance of the testimony. We are of the opinion, therefore, that there was no reversible error in giving the instruction.

Some objection was urged in the Appellate Court to the admission of testimony on behalf of the plaintiff, but we think there was no substantial error in that regard. The real question in the case is one of fact,—that is, whether the defendant's servants were guilty of the negligent acts charged in the declaration, thereby inflicting the alleged injury upon the plaintiff. We are unable to see any reasonable ground for holding that that question was not fairly submitted to the jury by the instructions. The verdict of the jury and the judgment of affirmance in the court below have therefore settled the question in

the plaintiff's favor, and even if slight errors did appear in the record, not materially affecting that finding, the judgment could not properly be reversed on that account.

The judgment will be affirmed.

Judgment affirmed.

CHARLES W. NICHOLAS

v.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer.

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. SPECIAL ASSESSMENTS—*notice which fails to identify property is fatally defective.* A court cannot entertain an application for judgment of sale for a delinquent assessment where the collector's notice of the application fails to sufficiently describe the property sought to be sold, nor, in the absence of a general appearance, is an amendment of the notice of any avail.

2. APPEARANCE—a *general appearance cures defective notice.* A general appearance by an owner in a proceeding to sell property for a delinquent assessment cures all defects in the notice of the application for judgment of sale.

3. SAME—*special appearance must be for jurisdictional purposes only.* A special appearance must be for the purpose of urging jurisdictional objections only, and if any of the objections interposed can be sustained only by an exercise of jurisdiction, the appearance is general, though in terms limited specially.

APPEAL from the County Court of Cook county; the Hon. O. N. CARTER, Judge, presiding.

DAVID G. ROBERTSON, for appellant.

JOHN D. ADAIR, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Cook county rendered judgment, on the application of the collector of that county, against the lands of appellant returned as delinquent, for a spe-

cial assessment levied by the city of Chicago. Appellant filed his written appearance in the county court, stating that he appeared specially for the purposes of his motion only, and objected to the jurisdiction of the court. He moved to dismiss the application for judgment, and in support of his motion stated seven objections to the proceedings. The first and second of these objections were that the notice published by the collector was insufficient. The objections were heard, and appellant proved by the county surveyor that the lands could not be identified from the description contained in the notice. Thereupon the court, on motion of the collector, permitted an amendment of the notice so as to correctly describe the land. The tax, judgment, sale, redemption and forfeiture record showing the property was offered in evidence. The motion to dismiss and the objections were overruled and appellant moved for a new trial, which motion was also overruled and the judgment was entered.

The notice published was so defective that the court acquired no jurisdiction by virtue of it, since the land could not be identified from the description, (*Pickering v. Lomax*, 120 Ill. 289,) and if appellant did not submit to the jurisdiction of the court, such jurisdiction would not be acquired by an amendment of the notice. The case of *People v. Green*, 158 Ill. 594, was where there was a general appearance by the defendants, and the court had jurisdiction. Appellant had a right to appear specially and question the sufficiency of the notice to confer jurisdiction, and if he went no further the court would have no right to render a judgment. But a defendant may enter his appearance in a tax case as well as in a personal action against him, and if the appearance of appellant was general, it made no difference whether the notice published was defective or not. (*People v. Sherman*, 83 Ill. 165; *Hale v. People*, 87 id. 72; *Mix v. People*, 106 id. 425; *People v. Dragstran*, 100 id. 286.) A special appearance must be for the purpose of urging jurisdictional objections only, and it

must be confined to a denial of jurisdiction. An appearance for any other purpose than to question the jurisdiction of the court is general. (2 Ency. of Pl. and Pr. 632; *Abbott v. Semple*, 25 Ill. 107; *McNab v. Bennett*, 66 id. 157; *Crull v. Keener*, 18 id. 65.) In *Crull v. Keener*, *supra*, it was said (p. 66): "There are cases where the defendant may make a *quasi* appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences." If he appears to the merits no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. 2 Ency. of Pl. and Pr. 625.

In entering his appearance in this case appellant did not confine himself to the question of jurisdiction, but stated seven objections against the proceeding. The seventh was: "That the improvement for which said assessment was made has been built and paid for by these objectors at their own private expense, and the same has been approved and accepted by the city of Chicago." By this objection appellant called upon the court to hear and decide the question whether the improvement had been built, paid for and accepted as alleged. This the court could only do upon the hypothesis that it had jurisdiction, and the objection clearly went to the merits. He could not invoke the judgment of the court on all his objections without a general appearance, and could not in the same paper ask for an exercise of such jurisdiction and disclaim an intention to submit to it.

The judgment will be affirmed.

Judgment affirmed.

THOMAS W. KINSER

v.

THE CALUMET FIRE CLAY COMPANY.

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

1. **PRINCIPAL AND AGENT**—*agent's general authority is limited to the scope of his agency.* An agent employed to sell sewer-pipe has no general authority to bind his employer by a contract, to the effect that if a contractor would reduce his bid sufficiently to get a public contract for sewer building, his employer, if the necessary pipe were purchased from him, would see that the contractor lost no money on the contract.

2. **TRIAL**—*when court may peremptorily instruct for plaintiff.* Where the sole defense to a suit is based on the breach of a contract made between the defendant and an agent of the plaintiff, the court may instruct the jury to find for the plaintiff, where the contract proved by the defendant is clearly outside the general scope of the agent's employment, and no attempt is made to prove express authority or ratification.

3. **SAME**—*court may refuse to allow jury to be polled when verdict was directed.* The trial court may refuse to allow the jury to be polled when the verdict returned by them is in accordance with the court's peremptory instruction.

Kinser v. Calumet Fire Clay Co. 64 Ill. App. 437, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANCIS ADAMS, Judge, presiding.

HAMLIN, SCOTT & LORD, for appellant:

Where a principal is absent, a general agent must necessarily possess and exercise the same powers and authority in the business that his principal could if present. *Insurance Co. v. Grunert*, 112 Ill. 68.

Power to act generally in a particular business, or a particular course of trade in a business, however limited, constitutes a general agency, if the agent is so held out to the world, however restricted his private instructions may be. *Crain v. Bank*, 114 Ill. 516.

165	505
89a	1622

165	505
p187	1287
90a	*138

165	505
198	*284

An agent interested in a company, and representing it in another State, is presumed to be empowered to transact all his principal's business in that State. And this constitutes a general agency, and his declarations as to consideration bind the principal. *Carver v. Louthain*, 38 Ind. 531; *Insurance Co. v. Peters*, 75 Ill. 435; 1 *Parsons on Contracts*, 40.

This is a presumptive fact, which stands until rebutted by evidence showing that the agent in fact exceeded his authority in doing the act. 2 *Morawetz on Corp.* sec. 616.

The right of trial by jury as heretofore enjoyed includes the right to poll the jury,—to ascertain whether the verdict as signed was the verdict of each man. *Martin v. Morelock*, 32 Ill. 487.

Counsel have the right to ask a juryman if the verdict he is directed to sign is his verdict, and a juryman has a right to say no. *Poppers v. Bank*, 10 Ill. App. 534.

WILLIAM P. HAYS, and SULLIVAN & MCARDLE, for appellee:

When the court directs a verdict, an issue at law is raised upon the whole case, and, there being no fact for the jury to find, it is not error to refuse to allow the jury to be polled. *Donoghue v. Railway Co.* 87 Mich. 13; *Bell v. Hutchings*, 86 Ga. 562.

A general agency, until revoked, is co-extensive in scope and duration with the business. *Insurance Co. v. Grunert*, 112 Ill. 68; *Hess & Co. v. Heegaard*, 54 Ill. App. 227.

An agent employed to sell has power, in binding his principal, to do only what is necessary in the course of the business of selling. *Boltz v. Huston*, 23 Ill. App. 579; *Monson v. Jacques*, 44 id. 307; *Williams v. Merritt*, 23 Ill. 573.

Everything is presumed to be within the scope of a general agent's powers, but when the agent is one for a special purpose nothing is presumed. *Williams v. Merritt*, 23 Ill. 573; *Thornton v. Boyden*, 31 id. 200; *Baxter v. Lamont*, 60 id. 237; *Taylor v. Railroad Co.* 74 id. 86.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee obtained judgment against appellant in the circuit court of Cook county by default, for \$1973.86. Subsequently the court set it aside, and allowed defendant to plead upon his executing bond to pay any judgment which might be obtained against him. He executed the bond and filed several pleas, one of which set up "that at the instance and request of the plaintiff, defendant entered into a contract with the city of Anderson, Indiana, to construct for said city, within its limits, a system of sewers, for which said city agreed to pay the defendant \$71,850, and at the same time, and contemporaneously with the making of said contract, defendant agreed to purchase of plaintiff the sewer-pipe necessary to go into the said system of sewers, upon the plaintiff representing and agreeing that it would allow him, the defendant, a credit on the purchase price of said sewer-pipe equal to the amount, if any, which he, the defendant, might lose in completing the contract with the city of Anderson, according to the specifications, at the price of \$71,850; that defendant completed the contract at a cost to him of \$78,000, and has paid to the plaintiff all he agreed to pay it as the contract price for such sewer-pipe, except \$1650; that the plaintiff was active, as the work progressed, in collecting from defendant the purchase price of said sewer-pipe, and defendant, upon the completion of said work, found it had cost him more than the contract price; that if he were to pay the plaintiff the amount claimed of him, he would lose on said contract with the city of Anderson \$6000; that the plaintiff was so informed and requested to account with the defendant, to pay over to him the amount he would lose on said contract over and above \$1650, all of which the plaintiff has refused to do, which said sum of money which has been overpaid to the plaintiff, to-wit, \$6000, so due from the plaintiff to the defendant as aforesaid, exceeds the damages sustained by the plaintiff by reason of the non-performance

by the defendant of the several supposed promises in the said declaration mentioned, and out of which said sum of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff,—and this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have its aforesaid action against him, and that he may have judgment against the plaintiff for \$4000."

The defense relied upon on the trial was that averred in this plea. The only testimony introduced in support of it was to the effect that one Frank Hartford, who represented the plaintiff in the sale to defendant of the sewer-pipe used by him in the Anderson contract, at the time of the bidding told him he must reduce his bid of \$80,000 below \$72,000 as another bidder had bid the latter amount; that upon defendant replying that he could not "do it and come out on it," Hartford said: "If you can't do that we will see that you don't lose any money. We want to sell our pipe, and we don't want to sell it to this other party. I want to sell this pipe to you. There is one other man that is going to bid on this contract, and I will see that you don't lose any money;" that upon the making of these statements the bid was reduced below \$72,000 and the contract awarded to defendant; that in the performance of it he lost \$6000. After this evidence had gone to the jury the court excluded it, on the ground that there was no proof offered to show that Hartford had authority to bind the plaintiff by such an agreement. The jury were then instructed to return a verdict for the plaintiff for \$1973.86, which they did. Counsel for the defendant then requested the court to allow him to poll the jury, which was denied and judgment entered on the verdict. The Appellate Court having affirmed that judgment this appeal is prosecuted.

It is clear that the evidence introduced on behalf of the plaintiff entitled it to the judgment rendered, unless the defense set up in the plea of set-off was sustained.

It is not claimed that any proof whatever was offered of express authority from the plaintiff to Hartford to enter into a contract like that set up in the plea. There was therefore an entire absence of proof of such authority, unless it can be said that, being the agent of the company to sell its sewer-pipe, authority to bind it by his agreement that a purchaser should lose nothing upon a contract is implied,—and such is clearly not the law. (*Toledo, Wabash and Western Railway Co. v. Elliott*, 76 Ill. 67; Story on Agency,—9th ed.—sec. 170; *Cooley v. Perrine*, 41 N. J. L. 322.) If, then, what was said between the parties, as detailed by the defendant, amounted to a contract on behalf of the plaintiff to repay the defendant all money which he might lose on the Anderson contract, (which is certainly very doubtful,) the plaintiff is not bound thereby, because no authority to make it was shown. The plaintiff having made a clear case, and the defense wholly failing for want of proof tending to establish a fact material and necessary thereto, the court was justified in peremptorily instructing the jury to find for the plaintiff.

The contention that it was error to refuse to allow the jury to be polled after it had obeyed that instruction is, in our opinion, wholly without merit. The peremptory instruction to find for the plaintiff was, in effect, taking the case from the jury. When the court directs a verdict an issue of law is raised upon the whole case, and there is no fact for the jury to find. To poll a jury upon the rendering of such a verdict would be an idle ceremony, resulting in no possible benefit to any one. *Donnohue v. I. & L. M. Ry. Co.* 87 Mich. 13; *Bell v. Hutchings*, 86 Ga. 562.

The judgment will be affirmed.

Judgment affirmed.

JOHN W. DOANE

v.

THE LAKE STREET ELEVATED RAILROAD COMPANY.

Filed at Ottawa October 16, 1896—Rehearing denied March 12, 1897.

1. ELEVATED RAILROADS—*pillars supporting superstructure are not an unwarranted obstruction of street.* The pillars used to support the superstructure of an elevated railroad are not an unwarranted obstruction of the street, as they are erections which aid and facilitate the use of the street for purposes of travel and convenience.

2. SAME—*permitting construction of elevated railroad on public street imposes no new servitude.* Permission given by a city council to a company to construct and operate an elevated railroad upon a public street the fee of which is in the city, does not impose a new servitude on such street nor subject it to an unlawful use.

3. SAME—*an illegal use of street must be redressed by public authority.* Where the use of a street for construction and operation of an elevated railroad has not been legally authorized, the only remedy therefor is an information in chancery filed by the Attorney General or the State's attorney in the name of the People, or a bill for injunction brought by the city.

4. INJUNCTION—*abutting owner cannot enjoin construction of railroad legally authorized.* The legally authorized construction of an elevated railroad upon a public street the fee of which is in the city will not be restrained by injunction at the suit of an abutting owner, as he has a complete remedy at law by an action for damages.

5. SAME—*abutting owner cannot enjoin illegal construction of elevated railroad in street.* A court of equity will not, upon the allegation of an abutting owner that the ordinance authorizing the construction of an elevated railroad in a public street is illegal, enjoin the construction until the question of the illegality of the ordinance can be determined, but will remit him to his remedy at law.

6. SAME—*Frontage act confers on abutting owners no new right.* Neither the Frontage act, (Laws of 1883, p. 126,) nor clause 90 of section 1, article 5, of the City and Village act, (Laws of 1887, p. 115,) which require the consent of the owners of more than one-half the frontage before the council can act, confers any new rights on abutting owners by which they can enjoin the construction of a railroad authorized by the council without the required consent.

7. DAMAGES—*present and future damages of abutting owner recoverable in one action.* An abutting owner suing an elevated railroad company unlawfully using a public street, for damages resulting to his property from the road's construction and operation, may recover

165 510
165 526
166 63
166 131
166 207

165 510
169 33
169 122
171 517
172 142
172a 387

165 510
75a 578

165 510
79a 574

165 510

181 297
181 299

181 303
181 313

165 510
183 72

165 510
184 598

87a 599
87a 600

165 510

d197 218
197 *282

100a *341

165 510

199 *347

165 510

e208 *571
e208 *578

e107a *127
e107a *127

165 510

114a *227
114a *229

in one action both present and future damages, as the injury is continuing and permanent, notwithstanding the road is unlawful.

8. ESTOPPEL—*elevated railroad estopped to question validity of ordinance under which it is operated.* An elevated railroad constructed and operated under an illegal ordinance, when sued for damages by an abutting owner, cannot defend on the ground that the road is liable to abatement as a nuisance, but, having availed itself of the grant of authority, is estopped to question its validity.

MAGRUDER, C. J., dissenting.

Doane v. Lake Street Elevated R. R. Co. 60 Ill. App. 471, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

FRANKLIN P. SIMONS, for appellant:

An abutter may maintain an action for injury to his street easement of light and air from the construction of the road. Booth on Railways, sec. 190, and notes; *Hine v. Railroad Co.* 36 Hun, 293; *Pysuro v. Railroad Co.* 13 Daly, 220; *Glover v. Railroad Co.* 51 N. Y. Sup. 1; *Patten v. Railroad Co.* 3 Abb. N. C. 306.

An abutting owner's right is not a mere right to light and air and passage, under the common law. It rests on grant and covenants. The jurisdiction of equity to protect by injunction a legal right of this character from continuous infringement is well established. *Earll v. Chicago*, 136 Ill. 285; *Zearing v. Raber*, 74 id. 409; *Newell v. Sass*, 142 id. 104; *Field v. Barling*, 149 id. 553; *Schworer v. Market Ass.* 99 Mass. 285; *Salisbury v. Andrews*, 128 id. 336.

The question is not as to the amount of damage, but as to the right, and the mere fact of a threatened continuous infringement of this right gives a court of equity jurisdiction. *Story v. Railway Co.* 90 N. Y. 123; *Lake View v. LeBahn*, 120 Ill. 92; *Field v. Barling*, 149 id. 556; *Peoria v. Johnson*, 56 id. 45.

An abutting property owner can maintain a bill for injunction against a railroad company attempting to con-

struct a railroad in the street in front of his premises without lawful authority. *Hickey v. Railroad Co.* 6 Ill. App. 172; *Railroad Co. v. Cheatham*, 58 id. 318; *Stewart v. Railway Co.* 58 Ill. 446; *Kirchman v. Railway Co.* id. 516.

HAMLIN, SCOTT & LORD, *amici curiæ*:

Any license granted to a railroad to occupy a public street without the petition required having first been presented to the council is void. *Hunt v. Railroad Co.* 121 Ill. 645; *McCartney v. Railroad Co.* 112 id. 611; *Railway Co. v. Chicago*, 96 id. 620; *Wiggins Ferry Co. v. Railway Co.* 107 id. 450; *Hickey v. Railroad Co.* 6 Ill. App. 172.

The right to light and air, and access to and from all parts of the street in front of an abutting lot, no matter who owns the fee of the street, is a property right appurtenant to such lot, the invasion of which will be the occasion of special damages to it. *Barrows v. Sycamore*, 150 Ill. 596; *Field v. Barling*, 149 id. 565; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Dill v. School Board*, 47 N. J. 421; *Railway Co. v. Cummingsville*, 14 Ohio St. 523; *Cook v. Burlington*, 36 Iowa, 102; *Story v. Railway Co.* 90 N. Y. 123; *Salisbury v. Andrews*, 128 Mass. 336; *Schworer v. Market Ass.* 99 id. 285.

For a continuing nuisance one may bring a new action every day, as each day it continues without right it is in the eye of the law a new nuisance. *Railroad Co. v. Schaffer*, 124 Ill. 11; *Railway Co. v. Thillman*, 143 id. 136; *Railroad Co. v. Baptist Church*, 137 U. S. 575.

Damages cannot be recovered in any one suit for injuries resulting subsequently to the bringing of the suit. *Brewing Co. v. Compton*, 142 Ill. 511; *Uline v. Railroad Co.* 101 N. Y. 98; *Wells v. Railroad Co.* 151 Mass. 46.

The principle that a property owner may recover all his damages against a railroad in a street is confined to the case of a railroad lawfully occupying a street. *Loeb v. Railroad Co.* 118 Ill. 211; *Railroad Co. v. Wachter*, 123 id. 440; *Brewing Co. v. Compton*, 142 id. 511; *Railroad Co. v. Schaffer*, 124 id. 112.

If the right did not exist before, the Frontage act creates a trust for the benefit of the abutting property holder, which he may enforce in equity. *Hunt v. Railroad Co.* 121 Ill. 638; *McCartney v. Railway Co.* 112 id. 612; *Wolverton v. Taylor*, 132 id. 197; *Harper v. Union Manf. Co.* 100 id. 229; *Bez v. Railway Co.* 23 Ill. App. 137; *Taylor v. Railway Co.* 80 Mich. 77; *Roberts v. Easton*, 19 Ohio St. 78; *Morris v. Thomas*, 17 Ill. 114.

KNIGHT & BROWN, and WILSON, MOORE & McILVAINE, for appellee:

The finding of the city council under the Frontage act cannot be questioned at the suit of an abutting owner. Municipal Code of Chicago, 1881, pp. 490, 504; *People v. Railway Co.* 73 Ill. 541; *Whittaker v. Venice*, 150 id. 195; *Ely v. Commissioners*, 112 Ind. 361; *Colona v. Eames*, 92 U. S. 484; *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*, 21 id. 544; *Lane v. Morris*, 51 N. H. 422; *Parker v. Catholic Bishop*, 146 Ill. 155; *Owners of Lands v. People*, 113 id. 299; *Osborne v. People*, 103 id. 224; *McGowen v. Duff*, 41 Ill. App. 57; *People v. Jones*, 137 Ill. 40; *Smith v. Comrs. of Highways*, 150 id. 385; *Nealy v. Brown*, 1 Gilm. 10; *Railway Co. v. Park Comrs.* 151 Ill. 204; *Cooley's Const. Lim.* (6th ed.) 501; *Humboldt v. Dinsmore*, 75 Cal. 604.

The use of a street or highway for the purpose of furnishing additional facilities for travel or transportation will not be enjoined at the suit of abutting owner. *Moses v. Railroad Co.* 21 Ill. 516; *Stetson v. Railroad Co.* 75 id. 74; *Patterson v. Railway Co.* id. 588; *Railway Co. v. Chicago*, 121 id. 176; *Railroad Co. v. McGinnis*, 79 id. 269; *Railroad Co. v. People*, 92 id. 170; *Schertz v. Railroad Co.* 84 id. 135; *Mills v. Parlin*, 106 id. 60; *Truesdale v. Grape Sugar Co.* 101 id. 561; *Insurance Co. v. Heiss*, 141 id. 35; *Corcoran v. Railroad Co.* 149 id. 291; *White v. Railroad Co.* 154 id. 626; *Railroad Co. v. Railway Co.* 156 id. 255.

The remedy for an unlawful use of a public highway is by information in chancery by the Attorney General or

by bill in chancery by the city. *Railway Co. v. Quincy*, 136 Ill. 492; *Attorney General v. Railroad Co.* 112 id. 520; *People v. Railroad Co.* 54 Ill. App. 348; Wood on Nuisances, (3d ed.) p. 109, secs. 80, 81; *Chicago v. Wright*, 69 Ill. 318; *Springer v. Walters*, 139 id. 419.

Appellant has an adequate remedy at law, and relief in equity will therefore not be granted. *Railroad Co. v. Darke*, 148 Ill. 226; *Railroad Co. v. Scott*, 132 id. 429; *Railroad Co. v. Robbins*, 159 id. 598; *Gault v. Railroad Co.* 157 id. 125; *Rigney v. Chicago*, 102 id. 64; *Railroad Co. v. Ayers*, 106 id. 511; *Railroad Co. v. Reich*, 101 id. 157; *Railroad Co. v. Stein*, 65 id. 75; *Gas Light Co. v. Graham*, 28 id. 73; *Railroad Co. v. Grabill*, 50 id. 242; *Railroad Co. v. Maher*, 96 id. 312; *Gas Light Co. v. Howell*, 92 id. 19.

Injunction will not be granted where it will operate greatly to the prejudice of the defendant and the public, without corresponding advantage to the complainant. *Pratt v. Railway Co.* 35 N. Y. Sup. 557; *Gray v. Railroad Co.* 128 N. Y. 509; High on Injunctions, 596; *H. & H. Co. v. Pashell*, 5 Del. Ch. 435; *Fernes v. Railroad Co.* 121 N. Y. 505; *Railroad Co. v. Adams*, 28 Fla. 656; *Ammerman v. Dean*, 132 N. Y. 355; *I. C. Com. v. Railroad Co.* 64 Fed. Rep. 981; *Nason v. Sanborn*, 45 N. H. 171; *Bassett v. Manufacturing Co.* 47 id. 427.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a bill for an injunction by appellant, as abutting property owner, to restrain appellee from building an elevated street railroad in Lake street, in the city of Chicago. The circuit court of Cook county sustained a demurrer to the bill and dismissed it for want of equity. The Appellate Court having affirmed that decree, this appeal is prosecuted.

The bill alleges that complainant is the owner of five business houses, numbered 33, 35, 37, 39 and 41, fronting on the street between the east line of Market street and the east line of Wabash avenue, holding title to the lots on which they are erected by lease from the owner of the

fee for a term extending from March 1, 1872, to March 1, 1957. It then sets up the passage of an ordinance by the city council, at the request of the defendant, authorizing and permitting it to construct and operate an elevated railroad in the street, (a copy of the ordinance being exhibited with the bill,) and alleges that the company has accepted the same and is proceeding to construct its road in pursuance thereof. It alleges that such ordinance is illegal and void, because passed without a valid petition therefor signed by owners representing more than one-half of the frontage of the street between said east line of Market street and east line of Wabash avenue, as required by the statute; that the distance between those lines is $2893\frac{1}{2}$ feet, being less than one mile, with a total frontage of $4511\frac{1}{2}$ feet, exclusive of street crossings; that in the preamble to the ordinance it is recited that the petition of property owners fronting on the street between the points named, "representing out of the total frontage of 4514 feet $2468\frac{1}{2}$ feet consenting to the construction and operation of said elevated railroad, has been presented to and is now on file with said council;" that such recital is not true; that there was presented to the said council by the defendant, before the passage of the ordinance, petitions "purporting to be signed by owners of the land representing more than one-half of the frontage on said Lake street between the east line of Market street and the east line of Wabash avenue;" that the defendant represented to the council that more than half the owners of the frontage had so consented; that a large number of signatures appearing upon said alleged petition were not the signatures of owners of the property for which they signed, or of any person actually authorized to sign the same or consent for any owner of property for such frontage, but are the signatures of persons purporting to act in a fiduciary capacity, as guardians, trustees, administrators, attorneys in fact, agents, etc. It is next stated that complainant caused the records and files of the pro-

bate, circuit and Superior Courts, as well as the records of the recorder of Cook county, to be examined, and obtained surveys of the frontage on said streets, and procured from the city clerk a correct copy of all petitions presented to the council by the defendant of owners purporting to have consented to the construction and operation of said road; that he caused to be made a true and correct search by abstracters of title for the owners of all lands along the route of said road, and on the information so obtained charges that those who signed certain consents were not in fact the real owners of the frontage signed for, some of these allegations being that they were not the owners of record; that guardians, trustees, agents, etc., were not authorized to sign the same, or that their authority so to do was not filed with the city council or presented with the petition. It is further charged, on information and belief, that the defendant, or some of its agents or employees, to procure the consent of certain parties signing said petition, paid them either money, bonds or stock therefor, and induced others to sign the same by threats and intimidation. It is then alleged that, deducting such signatures so improperly made, less than one-half of the owners representing the frontage on said street consented to the construction and operation of the said road, and that the ordinance authorizing the same is therefore illegal and void, and the defendant has no lawful authority to build its said road, and that if allowed to do so certain damages will result to the complainant's property, such as interfering with free access thereto and obstruction of air and light. The prayer is that the defendant be perpetually enjoined from proceeding with the construction of the said railroad.

The question for decision is, do the facts well pleaded in this bill entitle the complainant to the injunction prayed for? It is conceded that the common council of the city of Chicago is, by the provisions of our statute, given exclusive control and supervision of its streets,

the fee of which is vested in the municipality. While they are held in trust for the public use, and can only be appropriated to the purposes for which they were dedicated, it is the settled law of this State that permitting street railroads to be placed therein is not subjecting them to an unlawful use. It has often been so decided by this court as to surface roads, and no good reason has been suggested, and none, we think, can be offered, for making a distinction in this regard between elevated and surface roads. The road in question, if constructed in conformity with the requirements of the ordinance, will certainly obstruct travel upon the street by other means less, and be less hazardous to the public, than would a surface road. The pillars upon which the superstructure is to be built, which it is claimed will exclude the public from a part of the street, are but a necessary part of the road,—as much so as are rails and other parts of tracks constructed upon the ground, or as are trolley-posts placed in the street for operating an electric road by the trolley system. It is true that all these things do, to some extent, interfere with the use of the street by ordinary vehicles, but the inconvenience is one which must be borne for the benefit resulting to the public from the better modes of travel thus afforded. (*Moses v. Pittsburg, Fort Wayne and Chicago Railroad Co.* 21 Ill. 515.) We held in *Chicago, Burlington and Quincy Railroad Co. v. West Chicago Street Railroad Co.* 156 Ill. 255, that a street railway operated by electricity, with trolley-posts on the streets, was not a new servitude of the street, and that the poles were not unwarranted obstructions in the same, as are telegraph and telephone poles, "because such erections aid and facilitate the use of the public street for the purposes of travel and transportation." The same is true of the pillars used in constructing elevated roads. In view of the known fact that such elevated lines in large cities greatly accommodate the public by increasing the facility and safety of transit, it can scarcely be seriously

contended that permitting them to be constructed and operated is to subject the streets to a new servitude or unlawful use. The right of a city to permit them is clearly recognized by the act of July 1, 1883, entitled "An act in regard to the use of streets and alleys in incorporated cities and villages by elevated railroads and elevated ways and conveyors." 2 Starr & Curtis' Stat. chap. 114, secs. 201-203.

This court has frequently held, that where an additional use of a street has been granted by the city to build and operate a street railroad, an injunction will not be granted to restrain the construction or operation of the road at the suit of an abutting property owner; (*Moses v. Railroad Co. supra*; *Murphy v. City of Chicago*, 29 Ill. 279;) and that since the constitution of 1870 such owner can not maintain a bill to enjoin the same until the resulting damages to his property are ascertained and paid, but that his remedy is by action at law for such damages. (*Stetson v. Chicago and Evanston Railroad Co.* 75 Ill. 74; *Patterson v. Chicago, Danville and Vincennes Railroad Co.* id. 588; *Chicago, Burlington and Quincy Railroad Co. v. McGinnis*, 79 id. 269; *Peoria and Rock Island Railway Co. v. Schertz*, 84 id. 135; *Penn Mutual Life Ins. Co. v. Heiss*, 141 id. 35.) The same doctrine is recognized in *Corcoran v. Chicago, Madison and Northern Railroad Co.* 149 Ill. 291, and *White v. Elevated Railroad Co.* 154 id. 620. We said in *Chicago, Burlington and Quincy Railroad Co. v. West Chicago Street Railroad Co. supra*, (p. 273): "Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages."

But it is insisted on behalf of complainant, that on the facts set up in his bill the ordinance must be treated as passed without the required consent of abutting own-

ers, and therefore illegal and void, which being true, the defendant should be held as proceeding with the work without any authority of law whatever, whereas in the cases referred to lawful consent of the city was shown. The real ground upon which relief by injunction is denied in such cases is, that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property. He has no standing in equity on account of public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts. He can only invoke that jurisdiction in order to protect his property from threatened injury. His injury is a depreciation of the property, which is capable of being estimated in money and recoverable in an action at law, therefore a court of equity will not interfere by injunction. As stated by Chief Justice FULLER in *Osborne v. Missouri Pacific Railway Co.* 147 U. S. 253: "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and a remedy at law in fact inadequate before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere." To the same effect is the language used in the opinion of Justice BREWER in *In re Debs*, 158 U. S. 591.

In *Morris and Essex Railroad Co. v. Pruden*, 20 N. J. Eq. 530, cited in the *Debs case*, it is said: "Mere diminution of the value of the property of the party complaining, by the

nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. (*Zabriskie v. Jersey City and Bergen Railroad Co.* 2 Beas. 314.) It must not be overlooked that the defendants are engaged in a public work by the completion of which the public interest will be greatly advanced. The injunction by which the progress of the work is arrested must not only cause great injury to the defendant, but also is the occasion of great inconvenience to the public." And again: "The defendants will not occupy with the proposed track any of the complainant's lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property he has his remedy by action at law, whenever and as often as loss or damage ensues; and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance, or for its removal. But a strong case must be presented and the impending danger must be imminent to justify the issuing of an injunction as a precautionary and preventive remedy." *Drake v. Hudson River Railroad Co.* 7 Barb. 508.

In *Truesdale v. Grape Sugar Co.* 101 Ill. 561, Mr. Justice SCOTT, in the opinion adopted by the court, said (p. 564): "The track is to be constructed on lands not owned by complainants, and under a license from the only party having lawful authority to grant the privilege, and any expected damages that may be sustained by reason of the proposed work can only be recovered in an action at law. Equity will not entertain jurisdiction to enjoin the proposed work,"—citing the *Stetson*, *Patterson* and other cases. And Justice MULKEY, dissenting, also said (p. 565): "If the proposed railway, when put in operation, would be open to the public generally, then I concede, under the prior decisions of this court, an injunction would not lie at the suit of a private individual, however much he

might be injured by the building and operating of such road. But such is not the case here."

It was said in *Patterson v. Chicago, Danville and Vincennes Railroad Co. supra*, (on p. 590): "The claim is, that upon the principle of strict construction the company must be confined within the limits of the defined district. Without undertaking any discussion of this question, it is sufficient to say that the fee of the streets is in the city, and it has the power to control and regulate their use, and any such excess of authority in the use of a street as is here claimed *must be left to be redressed by the public authority, and equity should not, in such case, at the suit of a private individual, enjoin the operating of a railroad.*" This case has been often cited with approval in later cases.

Where the use of the street has not been legally authorized, as held in *McCartney v. Chicago and Evanston Railroad Co.* 112 Ill. 611, *Hunt v. Horse and Dummy Railway Co.* 121 id. 638, *Chicago, Burlington and Quincy Railway Co. v. City of Quincy*, 136 id. 489, and *Metropolitan City Railway Co. v. City of Chicago*, 96 id. 620, an information in chancery by the Attorney General or State's attorney on behalf of the People, or, as in the last named case, a bill for injunction by the city, affords a proper and complete remedy. If, as contended, the abutting owner can also maintain a bill on the same ground,—that is, that the building of the road is without the valid consent of the city,—then the language in the *Patterson case*, "and any such excess of authority in the use of a street as is here claimed must be left to be redressed by the public authority," must be overruled and the authorities above cited as to the remedy by the Attorney General or city qualified. If a railroad is legally authorized no one can enjoin its construction. In other words, it is only when the consent of the city has not been lawfully obtained that any one can complain in a court of equity, and, therefore, when it is said "the remedy is by the public authorities, the abutting property holder being remitted to his action at law for

damages," cases in which the work is unlawful must be contemplated, and such is clearly the force of the *Patterson case*, *supra*. This doctrine is recognized again in the *Corcoran case*, *supra*. In the *Schertz case*, *supra*, the ordinance authorized the laying of a track along a street on condition that the consent of property owners on the opposite side of the street should first be obtained, but the company proceeded with the work without complying with that condition, and a bill for injunction by an abutting property holder was filed. As shown by the bill in that case, the defendant was proceeding illegally and certainly without the consent of the city, and the question was directly brought to the attention of the court, as appears from the dissenting opinion there filed, but the relief was denied.

The principle is, that, the abutting property owner having a complete remedy at law, a court of equity will not, upon his allegation that the ordinance authorizing the construction is illegal, enjoin the defendant from proceeding until the question of illegality can be litigated and determined, but will remit him to his action at law,—and this, it seems to us, is a just and reasonable rule, the enforcement of which will protect the rights of all parties interested. To hold otherwise would be to render impracticable the building and operation of street car lines under our statute. While such improvements are owned and operated by private individuals or corporations, the use of the streets is public and not private, and upon that theory alone they are permitted to be constructed in the streets, and it will not be denied that in large and populous communities they are of great public utility, if not a public necessity. While, therefore, the private owner is entitled to have all his property rights fully protected, that right should be accorded him, if possible, by a remedy which will not unnecessarily injure others and render impossible the construction and operation of necessary facilities for public travel. A moment's

reflection will, we think, convince any one that if every abutting owner not consenting may enjoin street railway companies from building their lines in streets upon the ground that the consent of the city has not been legally obtained, because of facts alleged which do not appear upon the face of the proceedings, the building and operation of all such lines will become practically impossible. In a case like this the work would necessarily be stopped until titles to abutting property could be adjudicated and settled, the powers of agents, etc., determined, and the motives which may have prompted owners to give their consent inquired into; and after this had been done, which, in the ordinary course of litigation, would require many months or even years of time, if the facts should be found in favor of the validity of the ordinance the work could proceed as to this complainant, he still being entitled to his action for damages. The decision, however, would settle the validity of the ordinance between him and the defendant, and no one else. Any number of other owners might, in succession, procure injunctions on the same or similar grounds, and prosecute them to a like final determination. Manifestly, neither persons nor corporations would hazard capital in an enterprise subject to such uncertainty and delay. There is a certain, adequate and complete remedy at the suit of the public whenever there is a threatened or actual unlawful obstruction of the streets and highways, and, as we think, an equally certain, adequate and conclusive remedy to the abutting owner for all his damages, present and prospective. The contention that he cannot have such remedy by a single action we deem untenable. It is not denied that the damages for which he would be entitled to recover are the same in kind as if the building of the road were lawful.

But it is said that, being in the street unlawfully, the obstruction is a public nuisance, subject to be abated and removed at any time, and therefore the recovery could only be had for damages to the time of bringing the suit.

This position is based upon the proposition that a railroad unlawfully in a street is a public nuisance, and liable, as such, to be abated at any time, and therefore a recovery for damages can only be had to the time of bringing the action, and hence a multiplicity of suits will become necessary to give the complainant a complete remedy. The position is untenable. The injury would be a continuing and permanent one, and therefore a single recovery can be had for the whole damages, present and future. (*Chicago and Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203, and authorities cited; *Galt v. Chicago and Northwestern Railway Co.* 157 id. 125.) Moreover, we think it clear the defendant, if sued for resulting injury, could not be heard to say its road was a nuisance or built in violation of law. Having accepted and availed itself of the grant of authority from the city to occupy the street, it would be estopped to question the validity of that authority. For the purposes of a recovery against it of damages, whether present or prospective, its road must be deemed lawfully in the street and it compelled to fully compensate all parties injured upon that theory. This proposition seems to us so reasonable that authorities need scarcely be cited in its support. It is, however, fully sustained by the following cases: *City of Chicago v. Wheeler*, 25 Ill. 396; *Higgins v. City of Chicago*, 18 id. 276; *People v. Maxon*, 139 id. 306; *Heims Brewing Co. v. Flannery*, 137 id. 309; *Joy v. St. Louis*, 138 U. S. 51.

It is again urged, that sections 1 and 2 of the statute of 1883, *supra*, known as the "Frontage act," give abutting owners a new right in streets that is enforceable in equity. We have carefully considered this branch of the case and the arguments of counsel in its support, and are unable to find anything in the statute to warrant the conclusion. It is substantially the same as paragraph 90, section 63, of the City and Village act, and it must be admitted that if one of these statutes has the effect of conferring a new property right upon abutting owners

the other has also. We think it is manifest that these provisions were intended merely as a restriction upon the authority of city councils and boards of trustees in cities and villages to authorize the laying of railroad tracks along streets or alleys, and in no way add to the rights of such owners in the streets. The amount of damages which such an owner is entitled to recover for injury to his property is certainly no greater since the passage of these statutes than it was before. We scarcely think it will be contended that in estimating the damages done to adjacent property the Frontage act can in any way enter into the consideration. In fact, we understand it to be conceded that the measure of complainant's recovery in an action at law would be the same whether the improvement is lawfully in the street or not, except as it is contended that damages can in the latter case only be recovered to the date of bringing the action. If the requisite consent is not given the ordinance may be treated as illegal, as the one in *Metropolitan City Railway Co. v. City of Chicago* was held to be, for want of the required notice, and that illegality would, as we have already said, authorize an action on behalf of the public, but would give an abutting owner no right to relief in a court of equity. For the same reasons it must be so held where the alleged illegality is the want of the required petition by owners of the frontage.

Our conclusion, upon considering the whole case, is, that the demurrer was properly sustained and that the judgment of the Appellate Court should be affirmed.

Able and elaborate arguments have been filed by counsel for the appellant, and authorities cited, which, it is insisted, sustain a different view as to equity jurisdiction. Keeping in mind the fact that the proposed construction of defendant's road will impose no unwarrantable additional servitude upon the street, none of the decisions of this court referred to are in point. Those cited from the State of New York are distinguishable in that there the

holding is that the abutting property holder can in no case recover future damages in an action at law, and equity jurisdiction is for that reason entertained,—in other words, having no complete and adequate remedy at law, courts of equity will afford him that remedy. Without undertaking to determine whether decisions cited from other courts are in conflict with the view here announced, it is enough to say that if they are they must also be held as conflicting with our former decisions.

Judgment affirmed.

MAGRUDER, C. J.: I cannot concur in this opinion.

185	526
189	33
189	122

ERSKINE M. PHELPS

v.

THE LAKE STREET ELEVATED RAILROAD COMPANY.

Filed at Ottawa October 16, 1896—Rehearing denied March 12, 1897.

This case is controlled by the opinion rendered in *Doane v. Lake Street Elevated Railroad Co.* (*ante*, p. 510.)

Phelps v. Lake Street Elevated R. R. Co. 60 Ill. App. 471, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

FRANKLIN P. SIMONS, for appellant.

Per CURIAM: This cause is controlled by the decision rendered in the case of *Doane v. Lake Street Elevated Railroad Co.* (*ante*, p. 510.) For the reasons stated in the opinion filed in that case the judgment of the Appellate Court herein is affirmed.

Judgment affirmed.

187:38 LRA 529

165	527
166	543
165	527
176	167

THE PEOPLE *ex rel.* Kern, State's Attorney,

v.

SAMUEL B. CHASE.

Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.

1. JUDICIAL POWER—*what is "judicial power," within the meaning of the constitution.* Judicial power is that power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.

2. SAME—*adjudication need not conclude the parties' rights.* An adjudication which involves the construction and application of the law and affects any of the rights and interests of the parties, though not finally determining them, is still a judicial proceeding and involves the exercise of judicial power.

3. CONSTITUTIONAL LAW—*act of 1895, concerning land titles, is unconstitutional.* The act entitled "An act concerning land titles," (Laws of 1895, p. 107,) is unconstitutional and void, as violating article 6, section 1, of the State constitution, by conferring judicial power upon the county recorder of deeds (who is, by the act, made *ex officio* register of titles,) and upon his examiners.

BAKER, CARTWRIGHT and CARTER, JJ., dissenting.

APPEAL from the Criminal Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

PENCE & CARPENTER, for appellant:

To adjudicate upon and to protect the rights of individual citizens, and to that end to construe the law, is the province of the courts. Cooley's Const. Lim. 91.

A judgment is the end of the law. It finally terminates the disputes and adjusts the divers interests of mankind. Freeman on Judgments, sec. 1.

A judgment is the decision or sentence of law pronounced by the court or other competent tribunal in a proceeding therein. 18 Am. & Eng. Ency. of Law, 59.

He exercises judicial functions who hears before he condemns; who proceeds upon inquiry and renders judgment only after trial. This is the definition of Daniel Webster in the *Dartmouth College case*. The acts of the registrar fall within these definitions.

Under our constitution all judicial power is conferred upon the courts, (art. 6, sec. 1,) and all our judges are to be elected and commissioned by the Governor, (art. 6, secs. 23-32,) and no other person can exercise judicial functions. *Hoagland v. Creed*, 81 Ill. 506.

JACOB J. KERN, State's Attorney, also for appellant.

HARVEY B. HURD, for appellee:

There are many acts of a *quasi* judicial nature which may be done by others than the judiciary. Of this character are some of the acts of the election commissioners and judges of election under the city election law, as passing upon the right of an elector to vote; (*People v. Hoffman*, 116 Ill. 587;) the acts of municipal authorities in determining the character of public improvements, such as sewers; and in many instances their determinations are not subject to revision by the courts. *Johnson v. District of Columbia*, 118 U. S. 19; *Child v. Boston*, 4 Allen, 41; *Hills v. Brooklyn*, 32 N. Y. 498; *Springer v. Walters*, 37 Ill. App. 332; *Wright v. Chicago*, 48 Ill. 285; *Crawford v. People*, 82 id. 557; *Lake v. Decatur*, 91 id. 597.

In the following cases powers of a judicial nature are held not to be encroachments upon the functions of the judiciary: *Hawthorn v. People*, 109 Ill. 302; *Owners of Land v. People*, 113 id. 296; *People v. Nelson*, 133 id. 565; *Railroad Co. v. Jones*, 149 id. 361; *Reid v. Morton*, 119 id. 118.

The trial of right of property before a sheriff with a jury is not a judicial proceeding. *Rowe v. Bowen*, 28 Ill. 116.

OLIVER & MECARTNEY, also for appellee:

It is not sufficient, to bring matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40.

The courts must look to the circumstances of each case presented, to ascertain whether an act is ministerial or judicial. *Davidson v. New Orleans*, 96 U. S. 97.

THEODORE SHELDON, and GEORGE W. SMITH, also for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an information in the nature of a *quo warranto*, by the People, on the relation of the State's attorney of Cook county, against appellee, the recorder of deeds of that county, to oust him from the office of registrar of titles, the object being to test the constitutionality of an act of the legislature approved June 13, 1895, entitled "An act concerning land titles." (Laws of 1895, p. 107.) The defendant set up, by way of plea, the statute. To that plea the relator filed a demurrer, which was overruled, and he elected to abide by it. Judgment was accordingly entered for the defendant, and the People prosecute this appeal.

It is contended that the statute contravenes several provisions of the constitution, and is therefore void. One of the contentions is, that it confers judicial powers upon the recorder of deeds (who is by the act made registrar of titles) and his examiners. If it does, counsel for appellee agree that it violates article 6, section 1, of the constitution, which provides that the judicial powers shall be vested in courts therein named, and the law is therefore invalid, without reference to other objections urged against it. In our view of the case it will only be necessary to decide this one question.

The act is very voluminous, consisting of ninety-four sections, but those bearing more or less directly upon the subject to be considered are the following:

"Sec. 7. The owner of any estate or interest in land, whether legal or equitable, and whoever has the power of appointing or disposing of the entire legal estate in fee simple, may apply to the registrar of the county in which the land is situated to have his title registered. He may apply in person, or by an attorney in fact authorized so to do. A corporation may apply by its authorized agent;

an infant by his natural or legal guardian; any other person under disability by his legal guardian."

"Sec. 11. The application shall be in writing, signed and sworn to by the applicant or the person acting in his behalf. It shall set forth, substantially: (a) The name and place of residence of the applicant, and if the application is by one acting in behalf of another, the name and place of residence and capacity of the person so acting. (b) Whether the applicant (except in the case of a corporation) is married or not, and if married the name and residence of the husband or wife. (c) The description of the land. (d) The applicant's estate or interest in the same, and whether the same is subject to an estate of homestead. (e) Whether the land is occupied or unoccupied, and if occupied, the name and post-office address of each occupant, and what estate or interest he has or claims in the land. (f) Whether the land is subject to any lien or incumbrance, and if any, give the name and post-office address of each holder thereof, and the nature and amount of the same, and if recorded, the book and page of the record. (g) Whether any other person has any estate or claims any interest in the land, in law or equity, in possession, remainder, reversion or expectancy, and if any, set forth the name and post-office address of every such person and the nature of his estate or claim. (h) If the applicant is a male, that he is of the full age of twenty-one years; if a female, that she is of the full age of eighteen years; if the application is on behalf of a minor, the age of such minor shall be stated."

"Sec. 14. Upon such application being filed with the registrar, he shall cause examination to be made into the applicant's title to the land and as to the truth of the matter set forth in the application, and particularly whether the land is occupied, the nature of the occupation if occupied, and by what right, and shall notify all persons who shall appear, by the application or otherwise, to have any interest in or lien or claim upon the land, of

such application, a copy of which notice shall be posted upon the premises, in a conspicuous place, at least ten (10) days before the granting of the certificate of title. No applicant for the registration of any interest in land under this act shall be required to furnish with his application an abstract of title or other evidence, except of instruments which are not then of record in the office of the recorder of the county in which the land is situated; but it shall be the duty of the examiners to examine, as the basis of their opinion, the full records of all instruments which are then of public record in said office, together with the original instruments, or abstracts thereof, of which the records have been destroyed by fire or otherwise. If any defects are found in the title which he thinks may be removed, he shall notify the applicant of the same, and give him a reasonable time to remove such defects before finally passing upon his application.

"Sec. 15. If it shall be made to appear to the registrar that the facts stated in the application are true, and that the applicant is the owner of the land or interested therein, as set forth in the application, he shall issue a certificate of title and proceed to bring the land under the operation of this act, as hereinafter provided. Otherwise he shall dismiss the application without prejudice, and return the papers to the applicant."

"Sec. 29. The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except: First, any subsisting lease, or agreement for a lease, for a period not exceeding five years, where there is actual occupation of the land under lease. The term 'lease' shall include a verbal letting. Second, all public highways embraced in the description

of the lands included in the certificate shall be deemed to be excluded from the certificate. Third, any subsisting right of way or other easement, however created, upon, over or in respect of the land. Fourth, any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title. Fifth, such right of action or counter-claim as is allowed by this act. Sixth, the right of any person in possession of and rightfully entitled to the land, or any part thereof, or any interest therein adverse to the title of the registered owner at the time when the land is first brought under this act, and continuing in said possession until the issuance of such last certificate of title.

"Sec. 30. After land has been registered, no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession, merely.

"Sec. 31. Except in case of fraud, and except as otherwise herein provided, no person taking from the registered owner a transfer of registered land, or any estate or interest therein, or of any charge upon the same, shall be held to inquire into the circumstances under which or the consideration for which the estate or interest of such owner, or any previous registered owner, was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest in the land; and the knowledge that any unregistered trust, lien, claim, demand or interest is in existence shall not, of itself, be imputed as fraud.

"Sec. 32. In any suit for specific performance brought by a registered owner of any land under the provisions of this act, against a person who may have contracted to purchase such land, not having notice of any fraud or other circumstances which, according to the provisions of this act, would affect the right of the vendor, the certificate of title of such registered owner shall be held in every court to be conclusive evidence that such registered

owner has a good and valid title to the land and for the estate or interest therein mentioned or described.

"Sec. 33. In any action or proceeding brought for ejectment, partition or possession of land, the certificate of title of a registered owner shall be held in every court to be conclusive evidence, except as herein otherwise provided, that such registered owner has a good and valid title to the land and for the estate or interest therein mentioned or described, and that such registered owner is entitled to the possession of said land, except as against any person rightfully claiming possession under some estate, mortgage, lien or charge noted on the certificate.

"Sec. 34. The register of any land, and duly credited copies thereof, shall, except as herein otherwise provided, be received in law and in equity as evidence of the facts therein stated, and as conclusive evidence that the person named therein as owner is entitled to the land for the estate or interests therein specified. The words 'heirs and assigns' shall not be necessary to create a fee simple estate of inheritance.

"Sec. 35. Whenever a memorial has been entered as permitted by this act, the registrar shall carry the same forward upon all certificates of title until the same is canceled in some manner authorized by this act.

"Sec. 36. All dealings with land, or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act and to such amendments and alterations as may hereafter be made. The bringing of land under this act shall imply an agreement, which shall run with the land, that the same shall be subject to the terms of the act and all amendments and alterations thereof.

"Sec. 37. With the exceptions mentioned in section 29, no person shall commence any action at law or in equity

for the recovery of land, or assert any interest, right in or lien or demand upon the same, or make entry thereon, adversely to the title or interest certified in the first certificate bringing the land under the operation of this act, unless within five years after the first registration. It shall not be an exception to this rule that the person entitled to bring the action or make the entry is an infant, lunatic or is under any disability, but action may be brought by such person by his next friend or guardian. It shall be the duty of the guardian, if there is any, to bring action in the name of his ward, whenever it is necessary to preserve or enforce the ward's rights in registered land.

"Sec. 38. Any person having any interest, right, title, lien or demand, whether vested, contingent or inchoate, in, to or upon registered land, which existed at the time the land is first registered, and upon or for which no cause of action shall have accrued at the date of the registration of the land, may, prior to the expiration of said five years after such registration, file in the registrar's office a notice, under oath, setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof; and if such notice or counter-claim is so filed, an action may be brought to assert or recover or enforce the same at any time within one year after the right of action shall have accrued thereon, or at any time within the period of five years after said first registration, and not afterwards. It shall be the duty of a life tenant or trustee to file such counter-claim on behalf of any remainder-man or reversioner, whether the remainder or reversion be at the time vested or contingent, and of a guardian to file such counter-claim on behalf of his ward."

Under these several provisions of the act, if A B claimed to be the owner of a lot in the city of Chicago, as devisee, in fee simple, and as such wished to have his title registered as authorized by section 7, his applica-

tion, in conformity with section 11, would be substantially as follows:

"A B, a resident of Chicago, Cook county, Illinois, unmarried, is the owner of lot.....(describing it) in fee simple, not subject to an estate of homestead, unincumbered, subject to no liens or incumbrances; that C D claims to own said lot in fee simple, and his post-office address is No.....,street, Chicago, Illinois; that this applicant is of the full age of twenty-one years.

(Sworn to) A B."

Suppose the applicant claimed such ownership as devisee under the will of John Doe, deceased. If the will was not recorded in the office of the recorder of deeds (the registrar) it would be the duty of the applicant to furnish a copy thereof, with his application, and any other instruments in his chain of title not then of record in that office. (Part of sec. 14.) Under other provisions of that section it would then become the duty of the registrar to cause an examination to be made as to the truth of the facts set forth in the application, and also whether the lot was occupied, and if so, the nature of the occupancy. He would next be required to notify C D, and all other persons whom he might find to be interested, by reason of possession or otherwise, and post a copy of the notice on the premises, at least ten days before granting the certificate of registration. If C D, being under no disability, appeared before the registrar in obedience to that notice, and set up claim to the lot as the only heir of John Doe, deceased, claiming that the will accompanying the application was not legally executed as provided by the statute, and that it did not, by a proper construction, devise the lot to A B, or if he was an infant, lunatic or under other disability, and no appearance was made for him by guardian, conservator or next friend, it would be the duty of the registrar, aided by his two examiners, to inquire into the matter, and settle, in the one case, the issue made between the parties, and in the other, *ex parte*, the claim of ownership set up in the application. If, upon such

investigation, he should find the facts stated in the application to be true, "*and that the applicant is the owner of the land in fee simple, as set forth in the application,*" he must issue a certificate of title and proceed to bring the lot under the operation of the act, as thereafter provided. But if, upon such examination, he should find that the facts stated in the application are not true, or that A B is not the owner of the lot, it would be his duty to dismiss the application without prejudice, returning the papers to the applicant. If he granted the certificate it would be substantially in the following form:

"STATE OF ILLINOIS, }
Cook County. } ss.

"A B, of Chicago, Cook county, Illinois, unmarried, is the owner of an estate in fee simple in the following land, to-wit: lot, in the city of Chicago. Witness my hand and official seal, this day of, 1896.

[Seal.]

SAMUEL B. CHASE, *Registrar.*"

In obedience to the provisions of section 17 of the act, this certificate could only be issued upon the written opinion of two examiners, appointed under section 5, filed with the registrar, "to the effect that the applicant has a good title to the estate or interest in the land, as stated in the application." Upon the issuing of the certificate, A B, in the absence of fraud to which he is a party, etc., would hold the lot in fee, free from all others, except, first, any subsisting lease, etc.; second, all public highways; third, any subsisting right of way; fourth, any tax or special assessment; fifth, "such right of action or counter-claim as is allowed by the act;" and sixth, the right of any person in possession of and rightfully entitled to the land, or any part thereof or interest therein, adverse to him at the time when the certificate was issued, as provided by section 29. With the exceptions mentioned in this section, neither C D nor any other person claiming the lot could commence any action at law or in equity for the recovery thereof, or assert any interest, right in or lien or demand upon the same, or make

any entry thereon adversely to the title of C D, unless the action should be brought within five years from that date (sec. 37); or, if the right existed at the time of the issuing of the certificate but no cause of action had then accrued, such party might, prior to the expiration of said five years, file in the registrar's office a notice, under oath, setting forth his interest, etc., and might then bring his action at any time within one year after the right accrued. (Sec. 38.)

It is insisted by counsel for appellant, that in such a proceeding before the registrar he would exercise judicial functions, and that the certificate so issued would be, in effect, an adjudication that A B was the owner of the lot in fee simple. It is contended, on the other hand, on behalf of appellee, by the several counsel representing him, that the acts of the registrar and his examiners are only ministerial, and, though performed by the exercise of judgment and discretion somewhat judicial in character, are in no way violative of the foregoing provision of the constitution. Their contention is, that the statute giving effect to the certificate of registration is nothing more or less than a statute of limitations, and it is said: "Under the act in question the registrar's certificates do not bind any one for the first five years. During that time they may be attacked directly or in a collateral proceeding. The sole object of the first certificate of title is to start the running of the Statute of Limitations. It is only by virtue of the limitation thus expressed that the certificate ever attains its conclusive effect. The registration of the land and the issuing of the certificate of title start the running of the Statute of Limitations, and nothing will arrest its operation except the interposition of some adverse claim, which must be made to appear upon the register. Therefore, when the five years have expired and nothing appears upon the register to the contrary, the conclusion is inevitable that nothing can ever be brought forward to disturb the registered

title. The advantage of this limitation over our other statutory or common law limitations is, that it is based entirely upon matter of record, namely, the registration of the first certificate of title. As it is started by only matter of record, so, if arrested at all, it will be arrested by a matter that will appear upon the same record. Therefore, whether all adverse claims are barred or not can be told by looking at the register."

Conceding all this to be true, it does not, in our opinion, follow that the proceeding before the registrar is not judicial in its character, within the meaning of the constitution, nor that the registrar and examiners, upon whose opinion the validity of A B's title is determined, are not clothed with judicial powers. Whether the principal thing to be determined by them be the ownership of the land, or merely whether it shall be brought under the provisions of the act, or only when the Statute of Limitations shall begin to run, it seems clear that the adjudication is upon the rights of the parties claiming as owners, by construing and applying the law to the facts of the case. The definition of judicial power given by Judge Cooley in his work on Constitutional Limitations, held by this court to be sufficiently accurate for the purposes of the question then before the court, which was in substance the same as that now under consideration, is as follows: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws." (*Owners of Lands v. People ex rel.* 113 Ill. 296.) We do not understand that under this definition, or under any definition of the term "judicial powers," it is necessary that the adjudication between the parties shall be conclusive of their rights put in issue; but if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, and that adjudication involves the construction and application of the law and affects any of the rights or interests of the parties, though

not finally determining the rights, it is still a judicial proceeding or the exercise of judicial functions. The question, therefore, in the supposed case is, not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership.

As we understand the argument of counsel for appellee, their position is, that the proceeding before the registrar is not to determine the ownership of the lot, but simply to ascertain whether, under the existing facts, the lot shall be brought under the act, and that the determination of the ownership is merely incidental to the ministerial act of bringing the property into registration, and that the courts are left open to all parties claiming any interest adversely to the holder of the certificate of title. It is nevertheless true, that the rights in the case stated of C D are substantially and conclusively affected by the decision that A B is the owner and entitled to have the lot brought under the act in question. It will not be denied that the issuing of the certificate puts in operation the Statute of Limitations against C D, and that it in effect amounts to a determination that if his rights are not asserted in the courts within five years thereafter (unless within the provisions of section 38) he shall be forever barred. In other words, if it be true that the issue before the registrar is whether the property shall be registered and whether the Statute of Limitations shall from that time begin to run, the decision of that question involves the determination of the ownership of the property; and if it be conceded that the courts are left open to C D for a period of five years from that date, the decision nevertheless takes away from him the existing right to bring his action without that restriction. The decision against him that the property shall be brought under the provisions of the act is as fatal to his right of ownership as though that question were finally and conclusively settled, except that he still has

a limited time in which to have his title settled in a court of law or equity.

In case of disability at the time the registrar issues his certificate, the right reserved to bring the action within five years may be of no benefit whatever. Section 37 expressly provides, that "it shall not be an exception to this rule" (that is, that the requirement that the action must be brought within five years,) "that the person entitled to bring the action or make the entry is an infant, lunatic or is under any disability, but action may be brought by such person by his next friend or guardian." Let it be supposed, in the case put, that C D, at the time of registration, is a child one year of age, without guardian, and, of course, incapable himself of procuring the appointment of one. The registrar decides, and issues a certificate which starts the running of the Statute of Limitations against him. As to that fact his decision is conclusive. When the statute has run C D is six years of age, still without guardian and still incapable of procuring the appointment of one,—incapable of knowing or protecting any of his rights,—and yet, by the determination of the registrar that A B was the owner of the lot and entitled to a certificate of registration, his rights are absolutely and forever barred. How did the registrar arrive at the conclusion that A B was the owner of the property? Clearly, by the examination of the facts and by construing and applying the law to those facts, in doing which he adjudicated upon the rights and interests of A B and C D, and decided in favor of A B and against C D in a matter of most vital importance.

It seems to us that the reading of this act forces the mind to the conclusion that it confers upon the registrar and his examiners judicial powers for the purpose of determining the rights of adverse parties. If, as is contended, the duties of the registrar are purely ministerial, why should he have been required to call to his assistance "two or more competent attorneys" to be ex-

aminers of title, as his legal advisers? Why, if his duties are merely ministerial, should he be limited in his right to bring the property within the provisions of the act, to cases in which he should have the favorable opinion of at least two of these examiners? Manifestly, the act contemplates that he shall consider and apply the law to the facts presented by the applicant, and, lest he should not be able to do so himself, he is required to call to his aid those learned in the law. In the case supposed, whether the will was legally executed would to a lawyer be a simple question, but in its determination it would be necessary to understand and apply the provisions of the statute; and whether, by a proper construction of the instrument, a devise was legally made to a particular person, every lawyer knows would often become a matter most difficult of solution.

We are not unmindful of the well settled rule that there are many cases in which ministerial officers exercise *quasi* judicial powers or discretions and yet the laws conferring such powers are held to be no violation of the constitutional provision under consideration. These cases are referred to and commented upon in *Owners of Lands v. People ex rel. supra*. But what we have already said sufficiently distinguishes the powers conferred upon the registrar by this act from all such cases.

It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified, under the constitution, to exercise those powers, than is done by this law. This, doubtless, resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exists against the legislative grant of such powers upon non-judicial officers. The powers of the registrar are no less judicial under our statute than those in the countries

referred to. The only difference is, there this is no valid objection to the validity of the law, while here it is fatal. In *In re, etc. ex parte Bond*, 6 V. L. R. (L.) 458, in construing the Transfer of Land Statute, it is said: "The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law as well as in fact, ought not to be registered in the first instance, and to determine the validity of the instruments, as well as the priority of registration in point of time. He has therefore to discharge not merely ministerial, but judicial, duties."

Without further discussion of the question we are of the opinion that this law, for the reasons stated, is obnoxious to the constitution, and therefore void.

The judgment of the court will be reversed and the cause remanded to the Criminal Court of Cook county, with directions to enter a judgment of ouster against the defendant, as prayed in the information.

Reversed and remanded.

BAKER and CARTWRIGHT, JJ., do not concur in this opinion.

Mr. JUSTICE CARTER: I do not concur.

MATTHEW J. STEFFENS

v.

SAMUEL B. CHASE *et al.*

Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.

This case is governed by the decision in *People ex rel. v. Chase*, (*ante*, p. 527,) in which an act entitled "An act concerning land titles," (Laws of 1895, p. 107,) is declared to be unconstitutional.

BAKER, CARTWRIGHT and CARTER, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

S. P. SHOPE, and JOHN C. MATHIS, for appellant.

THEODORE SHELDON, (H. B. HURD, and GEORGE W. SMITH, of counsel,) for appellee Samuel B. Chase.

FRANK L. SHEPARD, (ROBERT S. ILES, of counsel,) for appellees the county board and the county treasurer.

ALLAN C. STORY, also for appellees.

Per CURIAM: This is a bill for an injunction, wherein Mathew J. Steffens, a resident, legal voter and tax-payer of Cook county, is complainant, and Samuel B. Chase, recorder of deeds, Daniel H. Kochersperger, county treasurer, and Daniel D. Healy and others, members of the board of county commissioners of said county, are defendants. The circuit court of Cook county sustained a demurrer to the bill, and rendered a decree dissolving the injunction and dismissing the bill for want of equity.

The cause involves the validity of the act of the General Assembly, approved June 13, 1895, entitled "An act concerning land titles." (Laws of 1895, p. 107). The case is governed by the decision of this court in the cause of *People ex rel. v. Chase*, (*ante*, p. 527,) in which the statute in question is held to be unconstitutional and void. For the reasons stated in the opinion filed in said *quo warranto* proceeding the decree rendered herein is reversed and the cause is remanded, with directions to overrule the demurrer to the bill and enter a decree in conformity with the prayer of the bill.

Reversed and remanded.

BAKER and CARTWRIGHT, JJ., do not concur in this opinion.

MR. JUSTICE CARTER: I do not concur.

JAMES H. KEELER

v.

PATRICK T. CLIFFORD.

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. CONTRACTS—a contract is generally severable when price is clearly apportioned. A contract will generally be held severable where the price to be paid thereunder is clearly apportioned to different parts of the work, although the work itself is single and entire.

2. SAME—on breach by one party other may abandon contract and recover *pro tanto*. Upon non-payment of an installment due under a contract the party entitled thereto may abandon the contract and recover the amount actually due thereunder; but he cannot recover lost profits on abandonment, unless prevented by the other party from completing his contract.

3. SAME—construction of term “to the satisfaction” of party, used in a contract. Where a contract provides that the work of one party shall be done “to the satisfaction” of the other, the necessary construction of the provision is that the work must be done in such manner that the other party, as a reasonable man, ought to be satisfied therewith.

Keeler v. Clifford, 62 Ill. App. 64, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

This is an action, brought by appellee against appellant to recover an amount claimed to be due by the latter to the former for a certain grading or leveling, alleged to have been done under the contract hereinafter set forth. It is admitted that, before the work was abandoned, Keeler had paid Clifford \$2400.00. It is alleged, however, that Keeler refused to pay any more upon the contract. The case was tried before a jury, and the trial resulted in verdict and judgment for the plaintiff below for \$1000.00. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted for the purpose of reviewing such judgment of affirmance.

The declaration sets out in substance, the following contract:

"*James H. Keeler:*

"CHICAGO, *March 31, 1891.*

"I hereby agree to remove all the dirt which has been dredged from the Calumet river south of One Hundred and Sixth street and on the east side of the river, and level the same to correspond with the grade of the Calumet River railway, and the top of the dock south of One Hundred and Sixth street, and that portion of the dirt, which is south of the south end of the dock owned by said James H. Keeler; I will remove east of the half section line of section 18-37-15 to correspond with the grade of said railway, and, when said work is completed, the surface of the land so filled shall be level and in good shape for any purpose. The whole work to be completed by the first of July next, or sooner if desired by James H. Keeler, for the sum of five thousand dollars (\$5000.00) to be paid as follows: when one-quarter of said work is finished, \$1000.00 is to be paid by said Keeler, and when one-half of said work is completed, another \$1000.00 is to be paid by said Keeler, and when three-fourths of said work is completed, another \$1000.00 is to be paid by said Keeler, and when the whole work is completed, the unpaid portion of said \$5000.00 shall be paid by said Keeler; all of said grading to be done to the satisfaction of said Keeler. It is understood that all of this grading is in the south half of section 18-37-15 and east of the Calumet river, Cook county, Illinois.

P. T. CLIFFORD."

"*Mr. Patrick T. Clifford:*

"I hereby accept your proposition for grading as herein mentioned.

JAMES H. KEELER."

The declaration then alleges, that plaintiff entered upon the work and continued it until August 31, when he had completed, in value, more than three-fourths of the entire amount of the work to be done under the contract, but that the defendant did not make the payments provided for in the contract, but refused to do so, and would not permit the plaintiff to complete said work, and hindered and delayed him from doing the same, whereby the plaintiff lost great profits and gains, etc., to-wit: the sum of \$4000.00.

The only other count is the consolidated common count, including the *quantum meruit* for work and labor. It was

agreed, that the defendant might offer in evidence, under the general issue, any matter of defense, which could have been introduced under a special plea.

R. A. CHILDS, and CHARLES HUDSON, for appellant.

BOOTH & BOOTH, for appellee.

Mr. CHIEF JUSTICE MAGRUDER delivered the opinion of the court:

It is assigned as error, that the court instructed the jury in behalf of the appellee, that, if they believed from the evidence that, by the terms of the contract, the defendant Keeler agreed to pay the plaintiff \$5000.00 for doing the grading or leveling therein described, at the times and in the manner therein stated, and that the defendant neglected and refused to make such payments at the time the plaintiff was entitled to receive the same (if they should believe from the evidence that the plaintiff was so entitled), then that the plaintiff was justified in abandoning his contract, and was entitled to recover for whatever amount of the grading or leveling the jury might believe from the evidence he had performed at the time he ceased work, less the amount of any sums shown by the evidence to have been paid by said Keeler; but that the jury, in estimating the amount he was entitled to recover, should compute the same according to the price fixed by the contract.

The first objection made to the instruction is, that it leaves it to the jury to construe the contract. The objection is not well taken. The jury are not required by the instruction to ascertain what the contract means; the instruction does not state the reasons and principles of law, by which the jury are to be bound in construing the language used in the contract, nor does it direct the jury to apply those rules and principles of law at their discretion to the question of construction. Nor does the instruction leave it to the jury to say, what any particu-

lar words therein used, mean. (*Streeter v. Streeter*, 43 Ill. 155; 2 Parsons on Contracts, *492). It is true, as counsel state, that what a contract means is a question of law, and that the court determines the construction of the contract. But we are unable to see, that the instruction here complained of violates this rule; it is not necessary for the court to explain to the jury, or construe for them, words of ordinary signification. If the counsel for appellant had desired to submit to the jury the question whether one-fourth of the work meant one-fourth in cubic yards moved, or cubic yards leveled, or one-fourth of labor or difficulty of the entire work, he should have presented instructions on that point; but none were asked for.

The next objection urged against the instruction is, that it treats the contract as a severable one. Appellant contends that the contract is entire, and that the appellee was obliged to complete the entire contract, before he could have a standing in court. We do not regard this objection as well taken. The question, whether a contract is entire or severable, cannot be determined by any precise rule, but must depend upon the intention of the parties, which in each case is ascertained from the language employed, and the subject matter of the contract. "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds, where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire." (2 Parsons on Contracts, marg. p. 517). Wharton, in his work on the Law of Contracts, says (sec. 748): "When a consideration is divisible, and the price can be apportioned, then, if a distinct and divisible portion of the consideration fails, the price paid for such portion can be recovered back." (See, also, *Bank of Antigo v. Union Trust*

Co. 149 Ill. 343.) Here the contract provides, that, when certain portions are completed, certain payments shall be made; by comparing the terms of the contract in evidence with the definition of a severable contract, as given in the quotations above set forth, it will be seen that the contract here is a severable one. The instruction under consideration complies with the law as laid down by this court in a number of cases; we have held, that a party, who complies with his contract, may recover for breach of it by the other contracting party, or he may abandon the contract and recover *pro tanto*; but, in the latter case, the contract price will fix the measure of damages. (*Evans v. Chicago and Rock Island Railroad Co.* 26 Ill. 189; *Folliott v. Hunt*, 21 id. 654; *Richards v. Shaw*, 67 id. 222; *Dwyer v. Duquid*, 70 id. 307; *Dobbins v. Higgins*, 78 id. 440). In *Dobbins v. Higgins*, *supra*, a contract had been entered into for grading a railroad, for which payments were to be made on monthly estimates; and, on the failure of the railroad to make one of the monthly payments for twelve days or more after it became due, the plaintiffs abandoned the work and sued; and it was there held, that the plaintiffs, having given notice that further failure to pay would be treated as a rescission, were justified in thus abandoning the work, and were entitled to recover for the work done and not paid for, *pro tanto*, at the contract price.

It is also claimed, that the trial court erred in refusing the first instruction asked by the appellant. We think that the instruction was properly refused. It states, that the earth excavated from the river "from the end of the dock to the center line of One Hundred and Eighth street was to be removed by the plaintiff." There is nothing in the contract requiring all the dirt to the center of One Hundred and Eighth street to be removed.

Complaint is also made, that the fourth instruction asked on behalf of the appellant was refused. This instruction told the jury, that if they should find from the evidence, that the work which was performed by the

plaintiff, and the grading done by him, were not done to the satisfaction of the defendant, then their verdict should be in favor of the defendant. This instruction was improper, because, where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man; the plain construction of the contract in this regard is, that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it. In the nature of things, it would rarely happen that a contract, abandoned or uncompleted by one party, would be fulfilled to the satisfaction of the other party thereto.

The sixth instruction was properly refused because it assumed that the contract, as set forth, was an entire contract, and that, unless each and all of the things called for thereby were done, the appellee was not entitled to recover anything. Under the principles of law already announced, and the construction already given to the contract, it is a severable one, and therefore the court committed no error in refusing to instruct the jury to the contrary.

There was no error in refusing to give the seventh refused instruction, because it required that the appellee should be actually prevented by appellant's act from completing his work. Under the present contract, the appellee was entitled to sue for and recover what was due at the contract price by reason of the non-payment by appellant of the third installment which fell due. The case of *Palm v. Ohio and Mississippi Railroad Co.* 18 Ill. 217, cited by counsel for appellant, holds that, unless one party to a contract has been actually prevented by the other from completing his contract, he cannot recover damages for lost profits; but it does not hold that for non-payment, where the contract is a severable one, he cannot sue and recover what is due at the contract price.

Appellant claims, that less than three-fourths of the work had been done, and that appellee was therefore not entitled to receive any further payment; whether or not appellee had completed three-fourths of the work before he brought this suit, and whether or not he was justified in refusing to go on with the work, are questions of fact, which are settled by the judgment of the lower court, and which we have no power to review.

It is furthermore contended, that the trial court excluded proper and material testimony. After a careful examination of the record and of the brief of counsel upon this branch of the case, we are unable to say that any such error was committed, as would justify us in a reversal of the judgment. It was immaterial to the issue what amount of dirt had been dredged from the Calumet river between One Hundred and Sixth and One Hundred and Eighth streets by the United States government. Testimony upon this subject could not have shed any light upon the question at issue, and could only have resulted in bewildering and confusing the jury.

The judgments of the Appellate Court and of the Superior Court of Cook county are affirmed.

Judgment affirmed.

SIEGEL, COOPER & Co.

v.

THE EATON & PRINCE COMPANY.

Filed at Ottawa November 9, 1896—Rehearing denied March 12, 1897.

1. CONTRACTS—*destruction of subject matter of contract excuses performance.* Where a contract is entered into with reference to the existence of a particular thing, which is destroyed before the time for the performance of the contract without fault of either party, both are excused, but neither is entitled to recover for a part performance thereof.

2. SAME—*contract which apportions payments to different parts of work is severable.* A contract is generally severable which clearly apportions the payment to different parts of the work, although the work may be, in its nature, single and entire.

3. SAME—*when contractor may recover for part performance.* A contract for placing an elevator in a building, which provides that one-half of the payment shall be made when the engine is on its foundation and final payment on completion of the work, is severable, and if the building is destroyed by fire after the engine is on the foundation the contractor may recover the part payment so agreed to be made.

PHILLIPS and CARTWRIGHT, JJ., dissenting.

Siegel, Cooper & Co. v. Eaton & Prince Co. 60 Ill. App. 639, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

This is an action by appellee, against appellant, begun in the circuit court of Cook county, to recover money due appellee under a contract to construct an elevator in a building belonging to appellant, which was destroyed during the progress of the work. The whole contract price was \$2500, payable as the work progressed, as follows: One-half when engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order. The first count of the declaration, which is in assumpsit, sets up the contract, and alleges that the engine mentioned therein was on the foundation prior to the fire, and claims a right to recover \$1250 by the terms of the contract. The second count also sets up the contract, and alleges the performance of work and furnishing of materials by plaintiff of the value of \$2000, when, without its fault, the building was destroyed. The plea is the general issue.

The cause was tried on the following stipulation: "It is hereby stipulated and agreed that the plaintiff and defendant entered into the contract hereto annexed on the first day of June, 1891; that under the said contract

the plaintiff, on the first day of August, 1891, had the engine mentioned therein on its foundation, but not leveled nor fastened to said foundation, and had prepared material and done labor under said contract to the total value of \$1390; that neither the cabs, the cage, nor the cable for the same, was on said premises at the time the premises of Siegel, Cooper & Co. were destroyed by fire; that the engine had been placed on the foundation, as aforesaid, about six o'clock on Saturday afternoon, August 1, 1891; that fire destroyed the premises of Siegel, Cooper & Co., in which said elevator and machinery therefor, under said contract, were to be placed, and broke out about 7:30 o'clock on Monday morning, August 3, 1891; that all work to be done under the contract had not been performed when the premises were destroyed by fire; that the premises were destroyed by fire without the fault of either party to the contract, and nothing had been paid to the Eaton & Prince Company by Siegel, Cooper & Co. under or upon the said contract; that defendant had the hatchways ready for the elevator work on July 10, 1891, and plaintiff had the uninterrupted use of the hatchways on and after said date. It is further stipulated that the jury in this case shall be waived, and the same submitted to the court for trial without a jury."

The following is the contract between the parties:

"*Siegel, Cooper & Co.*: "CHICAGO, ILL., *May 16, 1891.*

"We hereby propose to furnish and erect in your store, at State and Adams streets, one of our improved worm-gear'd steam passenger elevators. * * * This engine will be set on a substantial stone foundation, at the top of which will be placed a cut cap-stone, and the whole firmly secured with heavy iron anchor-bolts from bottom of foundation to bed-plate of engine. * * * Every part of the elevator and appliances will be put up in a neat, substantial and workmanlike manner, and is guaranteed to be free from all defects in material or workmanship, and should any appear in a reasonable time we will make such defects good at our own expense. You are to prepare and enclose the hatchways and to prepare a place for the

engine; to do all cutting of the walls and masonry; to furnish proper supports in place for guide-posts and sheave-beams, and do all painting. Should the roof be too low to allow the cage to travel to the top landing, it may be necessary to put the sheaves and sheave-beams on the roof. In that case you are to protect them. The hatchways are to be ready for the elevator work by the 10th day of July, 1891. After that date we are to have the uninterrupted use of them. The whole apparatus will be put up in complete running order, ready for steam connections, by the 15th day of August, 1891, for the sum of \$2500, payments to be made as the work progresses, as follows: One-half when engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order. Should any delay in the shipping or erecting of the elevator be occasioned by the purchaser, then the last payment shall be considered due on the date named for completion. Should any delay caused by you occur in the erecting after the men and material are at the building, or after the erecting is accomplished ready for steam and exhaust connection, then you are to pay for time and expenses of men caused by such delay.

"Respectfully submitted.

EATON & PRINCE CO.

F. H. P.

"We hereby accept the above proposal, and agree to all its conditions and terms of payment therein contained.

"June 1, 1891.

SIEGEL, COOPER & Co."

The plaintiff recovered judgment for \$1390,—the full value of material furnished and labor done. That judgment has been affirmed by the Appellate Court.

The trial court held the following propositions in the decision of the case:

"The court holds, as a matter of law, that if the plaintiff made and entered into the contract in evidence with the defendant for the construction of an elevator and appurtenances, as set forth in said contract; that work under said contract had so far progressed that the engine thereof had been placed upon its foundation, and that afterwards, and without fault on the part of the plaintiff, the building in which the said elevator, with its appurtenances, etc., was to be placed or constructed, was, on or about August 1, 1891, destroyed by fire, then the plaintiff

was excused from further compliance with said contract, and is entitled to recover of and from the defendant the sum of \$1250, with interest thereon at the rate of five per cent per annum from said August 1, 1891."

"And the court further holds, that if the plaintiff set about the performance of said contract and prepared material and machinery in accordance with the terms of said contract, and delivered a part thereof to the building in which said elevator and its appurtenances was to be constructed or built, and that afterwards, and on or about the first day of August, 1891, the said building in which said elevator was being constructed was destroyed by fire without the fault of the plaintiff, then, as a matter of law, the plaintiff is entitled to recover of and from the defendant the full value, to be determined by the evidence or stipulation of the parties, of all work done and material prepared and delivered to said building, pursuant to said contract, prior to the happening of the fire."

A. BINSWANGER, for appellant.

FLOWER, SMITH & MUSGRAVE, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

It is insisted that the court erred in holding the propositions set forth in the statement and in refusing counter propositions asked by appellant, its contention being that the contract is an entire one, and, the building in which the elevator was to be placed having been destroyed by fire before the time for final payment, without any fault of either party, no recovery for the work done or materials furnished could be had.

As will be seen from the plaintiff's declaration, it proceeded on two theories: First, that the contract was not an entire one, so far as the payments were concerned; and second, even if it was, under the law plaintiff was entitled to recover the value of the work done and materials furnished prior to the destruction of the building.

The judgment is upon this last theory, and is based upon the law as stated in the second of the above propositions.

The theory upon which the second proposition is based is, that under the contract requiring the elevator to be placed in a particular building it was the duty of defendant to furnish and provide that building, and therefore it is liable, even though the destruction was without its fault. The rule of law, as we understand it, is otherwise. Thus, in Addison on Contracts (sec. 554) it is said: "Where a man contracts to expend material and labor on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before the completion the buildings are destroyed by accidental fire, the contractor is excused from the completion of the work, but is not entitled to any compensation for the work already done, which perished without any fault of the employer." This doctrine is sustained by *Brumby v. Smith*, 3 Ala. 123, *Lord v. Wheeler*, 1 Gray, 282, and *Gillon v. Toudy*, 5 W. N. C. (Pa.) 528. The rule seems to be aduced from the case of *Appleby v. Meyers*, L. R. 2 C. P. 651. In that case the action was to recover for a part performance of a contract to furnish and attach to a building of the defendant certain machinery, to be paid for upon the completion of the work. The premises, together with part of plaintiff's materials, were destroyed by fire before the contract was completed. It was held that there was no right of action, the court saying: "We think when, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract but giving a cause of action to neither." See Bishop on Contracts, sec. 588.

It is insisted by counsel for appellee, and the decision of the Appellate Court is in conformity with that contention, that a different rule is announced in *Cleary v. Sohler*, 120 Mass. 210, and *Rawson v. Clark*, 70 Ill. 656. We do not so understand either of these cases. The Massachusetts

case was upon an oral contract to lath and plaster a certain building at a certain price per square yard. "No agreement was made and nothing was said as to terms or times of payment, but only that the work was to be done for forty cents per yard." A certain part of the work being done, the building was destroyed without the fault of either party. The amount claimed by plaintiff was \$474, the reasonable value of the work done. All that is said by the court in the decision of the case is: "The building having been destroyed by fire without the fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work done and materials furnished,"—citing *Lord v. Wheeler*, *supra*, and *Wells v. Colman*, 107 Mass. 514. This in no way conflicts with *Appleby v. Meyers*, *supra*, for it was said in that case: "It is quite true that materials worked by one into the property of another become part of that property. This is equally true whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such case the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts v. Havelock*, or because in consequence of a fire he could not go on with it, as in *Menetone v. Athawes*. But, though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it illegal or absurd in the workman to agree to complete the whole and to be paid when the whole is complete, and not till then, and we think the plaintiffs in the present case had entered into such a contract."

The case of *Rawson v. Clark* has no bearing whatever upon this case. There the plaintiff agreed to "manufacture and place in the building" certain iron work for a certain price, eighty-five per cent of which was to be paid on the certificate of the architect as the work progressed, and the balance, fifteen per cent, when the work was completed. The suit was for the iron work which had been manufactured. The evidence showed that the price agreed upon for manufacturing the iron was \$206, and for putting it up about \$75. Upon the completion of the manufacturing of the iron and the delivery of a small portion of it the defendant notified the plaintiff that the building was not ready for the work, and directed him to send no more until it should be ready, promising to notify him when that time arrived. A week later the building was destroyed by fire. The time required to put up the work would have been about two days, so that it clearly appeared in that case that the plaintiff was prevented from completing the work, not by the destruction of the building by fire, but because the defendant did not have it ready for the work when the plaintiff offered to complete it, and hence we said: "Appellees were no way in default. They were ready and offered to fully perform within the time limited, but were prevented by appellant. The reason of their not entirely completing their contract by placing the iron work in the building was the default of the defendant in not having a building provided for the purpose." This certainly does not mean that they were in default in not having a building because it was finally destroyed by fire, but because the building "was not then ready for the work," etc.

We think the law is, that where a contract is entered into with reference to the existence of a particular thing, and that thing is destroyed before the time for the performance of the contract, without the fault of either party, both parties are excused from performing the contract, but neither is entitled to recover anything for

a part performance thereof. It remains, however, to be determined whether this contract is an entire contract within that rule. It will be seen that by its terms payment was to be made, not upon the completion of the work, but "as the work progresses, as follows: One-half when the engine is on foundation, and final payment to be due and payable when the elevator is put up in good running order," thus clearly providing for payment by installments. Counsel insist, however, that this does not destroy the entirety of the contract, because, they say, the \$1250 was a mere arbitrary sum, fixed without reference to the value of the work done at the time designated for its payment, and that the phrase "when the engine is on foundation," merely named an arbitrary time at which a partial payment should be made, without reference to the value of the work and material furnished at that time, and that the payment of the installment in that manner was merely for the convenience of the contractor and as an evidence of the good faith of Siegel, Cooper & Co. in completing its part of the contract. If all this were true we are unable to see why the contract is not severable, so far as the payments are concerned. But we do not think the contract is fairly susceptible of that construction. The \$1250 is not a mere arbitrary sum fixed without reference to the value of the work done at the time of paying the installment. Payment was to be made as the work progressed,—one-half when the engine was on the foundation. The parties here fixed the sum, by agreement, which should be paid when the work had progressed thus far, and presumably with reference to the value of the material and labor then placed in the defendant's building. That it served the convenience of the contractor and evidenced the good faith of the employer in no way affects the case.

Parsons in his work on Contracts, (vol. 2,—6th ed.—sec. 517,) speaking of the entirety of contracts, says: "If the part to be performed by one party consists of several

distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed or is left to be implied by law, such a contract will generally be held to be severable; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire." See note c to the same section.

In *Schwartz v. Saunders*, 46 Ill. 17, Saunders made a contract with Schwartz to do the carpenter work and furnish the material therefor on a brick building being erected, to be paid for as the work progressed, upon estimates to be furnished by the architect. The building was blown down after an estimate of certain carpenter work and before the contract was completed, and it was held that the contractor, under such circumstances, was justified in abandoning the contract, and entitled to a mechanic's lien for the work done. It was contended there, as here, that the destruction of the building absolved both parties and protected the defendant from any action for the work done, the case of *Appleby v. Meyers*, *supra*, being relied upon to support the contention; but it was said of the *Appleby* case (p. 23): "This case we have examined, and from the statement of it it would appear that the contract was unlike the one between these parties, which provides, in terms, that eighty-five per cent of the work estimated by the architect should be paid as the work progressed, whilst in the case cited no payment was to be made until the work was completed, and as it was not completed the mechanic could not recover for the work he had done." It is true that there are distinguishing features between that case and this, prominent among which is the fact that there the defendant had positively refused to pay the architect's estimate of the work done before the destruction of the building, and afterwards refused to pay the same, insisting that to entitle him to pay therefor he was bound to

replace the work destroyed without any compensation, and the plaintiff's right to abandon the work was placed partly upon the refusal to pay and the unjust demand, as well as the destruction of the building. But the case does hold that where, by the terms of a contract of this character, payment is to be made as the work progresses, the doctrine announced in *Appleby v. Meyers* has no application.

We think the Appellate Court properly ruled that plaintiff was entitled to recover under the first count of the declaration, but we are unable to find authority or satisfactory reason upon which to sustain the second. The language, "payment to be made as the work progresses," cannot, we think, be considered to mean more than that the \$1250 should be paid as stated,—that is, it cannot be construed to mean that payments after the engine was on the foundation should be made as the work progressed, it being expressly stated, "final payment to be due and payable when the elevator is put up in good running order,"—that is, when the work was complete. Therefore, on a proper construction of the contract the second proposition should have been refused. There was, however, no error in the judgment of the trial court, because under the first proposition, which, as we have seen, was properly held, the plaintiff was entitled to recover the \$1250, with five per cent interest thereon from August 1, 1891, to the date of the judgment, July 5, 1895, which amounted to considerably more than the \$1390 recovered.

The judgment below will be affirmed.

Judgment affirmed.

PHILLIPS and CARTWRIGHT, JJ., dissenting.

ARTHUR J. HAWHE

v.

THE CHICAGO AND WESTERN INDIANA RAILROAD Co. *et al.*

165	561
166	617
165	561
99a	*557

Filed at Ottawa January 19, 1897—Rehearing denied March 9, 1897.

1. **WILLS**—*extrinsic evidence is not admissible to show intention where there is no latent ambiguity.* Where a will contains no latent ambiguity the testator's intention must be determined from the language of the will itself, and extrinsic evidence cannot be resorted to.

2. **SAME**—*extrinsic evidence is admissible to aid the language of a will.* In construing a will, evidence of the condition of the testator's mind at the time he executed the will, whether he lived with his family, and how much of a family he had, etc., is admissible to give the court the testator's situation, so that the will may be read in the light in which it was written.

3. **SAME**—*intention to disinherit after-born child need not be expressly stated.* A will disposing of the testator's entire estate to his wife absolutely, with power to sell and convey the same as "fully, amply and completely" as could the testator in his lifetime, sufficiently shows an intention to disinherit a child born two months after making the will, where the testator had two other children living when the will was executed for whom he made no provision. (*Ward v. Ward*, 120 Ill. 111, and *Salem Nat. Bank v. White*, 159 id. 136, distinguished and explained.)

MAGRUDER, C. J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. ELBRIDGE HANECY, Judge, presiding.

This was a bill in chancery brought in the circuit court of Cook county by Arthur J. Hawhe, against the Chicago and Western Indiana Railroad Company and the Wabash Railroad Company, for partition of certain lands and for an accounting.

It appears from the record that on or about December 31, 1872, Col. Arthur J. Hawhe died testate in Chicago, seized of the premises described in the bill of complaint. On the afternoon preceding his death he executed a will, by which he devised all of his property to his wife. The will was as follows:

"In the name of God, Amen.—I, Arthur J. Hawhe, of the city of Chicago, in the State of Illinois, being conscious that I am approaching my final dissolution, and while in full possession of my mental faculties, do make this my last will and testament:

"First—I direct and desire that I shall be interred to the rites of a christian burial.

"Second—I direct and desire that all my just debts be paid.

"Third—I hereby will, devise and bequeath all of my estate, real, personal and mixed, and of every kind whatsoever, to my beloved wife, Mary H. Hawhe, giving my said wife full power and authority to collect all debts and to compromise all debts due me, to pay all my debts and sell any and all of my estate, both personal and real, and to convey the same by bill of sale and by deed of conveyance as fully, amply and completely as I could have done in my own lifetime. I hereby appoint my beloved wife, Mary H. Hawhe, and her father, Rev. James Hill, executrix and executor of this my last will and testament."

The will was admitted to probate January 7, 1873. The executrix and executor named in the will declining to serve, the court appointed an administrator with the will annexed. At the time of the testator's death his family consisted of his wife, a daughter, aged four years, and a son, aged two years. The appellant, Arthur J. Hawhe, was born about two months after the testator's death. The land involved was owned by the testator at the time of his death, and in August, 1880, it was conveyed to the Chicago and Western Indiana Railroad Company by Mary H. Hawhe, as the widow and sole devisee of the testator, by one Waughop, her attorney in fact. The power of attorney gave him authority to "sign, seal, execute and deliver a quit-claim deed of all her right, title and interest in and to lots 43, etc., to any person or party he may see proper," etc.

The appellant predicated his right of recovery on the fact that he was a posthumous child, and as such he was entitled to recover an undivided one-third interest in the land; but on the hearing, on the pleading and evidence, the court entered a decree denying such right and dismissing the bill.

EDWARD T. CAHILL, for appellant:

The intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. *Kurtz v. Hibner*, 55 Ill. 514.

In case of a supposed ambiguity appearing upon the face of the will, parol evidence is not admissible to supply or contradict, or enlarge or vary, the words of the will, or to explain the intention of the testator. *Pennsylvania Co. v. Bauerle*, 143 Ill. 459.

Surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed. *Bingel v. Volz*, 142 Ill. 214.

It must be apparent from the will that the testator intended that the unborn child should not be specially provided for. *Railroad Co. v. Wasserman*, 22 Fed. Rep. 872.

EDGAR A. BANCROFT, (S. A. LYNDE, of counsel,) for appellees:

The court will look at the circumstances under which the devisor makes his will, as, the state of his property, of his family, etc. 2 Jarman on Wills, (5th Am. ed.) 841.

It is proper to show the situation of the testator, the number of his family and their means of subsistence, actual and prospective, at the time he made his will. *Little v. Giles*, 25 Neb. 313.

In construing a will the intention of the testator, as manifested by the words of the writings, in connection with surrounding circumstances, must be given effect. *Estate of Stebbins*, 94 Mich. 304; *Pool v. Blakie*, 53 Ill. 495.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It is first claimed in the argument by complainant's solicitor, that the court erred in allowing evidence tending to prove the condition and character of the testator's estate; evidence of the testator's testamentary capacity when he executed the will; evidence that he was residing with his family, consisting of his wife and two children;

and also evidence of one of the witnesses to the will that the testator "sat up in the bed and read the will deliberately before he signed it," and that he died that night.

With reference to the character and condition of the testator's estate, we find no evidence bearing on that question in the record except the inventory filed by the administrator with the will annexed, in the probate court,—and that, as appears from the abstract, was put in evidence by the complainant.

In regard to the capacity of the testator to make a will, that was a question controverted by no one, and proof of the fact could in nowise prejudice complainant.

But it is said, evidence that the testator was residing with his family, consisting of his wife and two children, and evidence of his testamentary capacity and physical condition when he signed the will, tended to prove the testator's intention outside of the will, and hence was incompetent. The law is well settled that extrinsic evidence cannot be resorted to to show the intention of a testator where there is no latent ambiguity in the will, but the intention is to be determined from the language used by the testator in the will itself. (*Hayward v. Loper*, 147 Ill. 41.) But we do not think the evidence objected to had any tendency whatever to vary or change the intent of the testator as declared in the will. As we understand the record, the evidence was not offered for that purpose. The object of the evidence was to place before the court the circumstances attending the execution of the will in support of and in aid of the intention of the testator as declared in the will, and the court, in the exercise of its discretion, had the right to hear such evidence. In the discussion of this subject it is said in Schouler on Wills (sec. 579): "But to aid the context of the instrument by extrinsic proof of the circumstances and situation of the testator when it was executed is constantly permitted at the court's discretion, and this constitutes a proper, indeed, often an indispensable, mat-

ter of inquiry when construing a will, for whatever a will may set forth on its face, its application is to persons and things external, and hence is admitted evidence, outside the instrument, of facts and circumstances which have any tendency to give effect and operation to the terms of the will, such as the names, descriptions and designation of beneficiaries named in the will; the relation they occupied to the testator; whether the testator was married or single, and who were his family; what was the state of his property when he made his will and when he died, and other like collateral circumstances. Such evidence, being explanatory and incidental, is admitted, not for the purpose of introducing new words of a new intention into the will, but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property,—in short, so as to enable the court to stand in the testator's place, and read it in the light of those surroundings under which it was written and executed." (See, also, *Little v. Giles*, 25 Neb. 313; *Doe v. Hiscock*, 5 M. & N. 363.) Here the evidence showed the will was executed on the day of the testator's death, and doubtless in anticipation of that event,—only a short time before complainant's birth; that the testator was then residing with his family, composed of his wife, a daughter and a son. The evidence did not in the least modify or change the intention of the testator as expressed in the will, but it gave the court the situation of the testator, so that it might with more ease properly place a construction on the language of the will as it was written.

But the real question presented by the record is, was it the intention of the testator, in view of all the provisions of the will, to disinherit the complainant in the bill. Section 10, chapter 39, of our Statute of Descents, provides: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that

account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given shall be abated in equal proportions, to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate." Here, if the testator had died intestate, the complainant would have inherited one-third of the land in question, subject to the dower of his mother, and it is claimed by him that it was not intended by the testator, by the will, to disinherit him, hence he is entitled to recover in like manner as if the testator had died intestate.

The testator, in his will, made no allusion whatever to any of his children,—those then born or those that might thereafter be born,—but devised all of his property to his wife, and in doing so used language that is very significant, meaning more than a simple devise. The will declares: "I hereby will, devise and bequeath all of my estate, real, personal and mixed, and of every kind whatsoever, to my beloved wife, Mary H. Hawhe, giving my said wife full power and authority to collect all debts and to compromise all debts due me, to pay all my debts, to sell any and all of my estate, both real and personal, and to convey the same by bill of sale and by deed of conveyance as fully, amply and completely as I could have done in my lifetime." Language could not have been used which would more clearly express an intention that the wife, and she alone, should take and hold the testator's estate to the exclusion of all others, than the language here employed. If the testator had inserted a clause in his will that no other person should have any portion of his estate, such a provision would have excluded the two children then born and those that might thereafter be born; and yet such a provision would not have made the intention of the testator more definite and certain that the wife should have his entire estate, as

declared in the will. The testator, in drafting his will, did not stop by simply devising all of his estate to his wife, but in order to remove all doubt in regard to his intention he went further, and declared, "giving my said wife full power and authority to sell any and all of my estate, both real and personal, and to convey the same by bill of sale and by deed of conveyance as fully, amply and completely as I could have done in my lifetime." Why should he insert this language unless he intended that his wife, and she alone, should have his entire estate to the exclusion of all others?

There is another significant fact which has an important bearing on the construction of the will. At the time the will was executed by the testator he had two children then living, one four and the other two years old. These children were excluded from taking any portion of the testator's estate by the will. Is it reasonable to believe that the testator intended to exclude these two infants and not at the same time exclude another child to be born within the next two months after the will was executed? It seems plain, if the testator had intended to make any distinction between his children then born or unborn, he would have inserted a provision in his will manifesting that intention. In order to disinherit appellant the testator was not required to state the fact in express terms in the will. It is enough that the intention appears from the will, upon consideration of all of its provisions.

The statute involved in this case was before the court in *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130, and in the decision of that case it was among other things said (p. 136): "But whether any provision is made for after-born children or not, the will, under this statute, must still remain as originally made, 'if it shall appear by such will that it was the intention of the testator to disinherit such child' or children. Does such intention appear by this will? That it does in case the husband of the testatrix survived her is too plain to admit of argument. A mere

reading of the instrument is all that is required to demonstrate that. But counsel urge that this intention must be stated in express terms in the will itself. This the legislature have not, by the statute, seen proper to require, and we have no right or power to add to it words which would entirely change its plain meaning, and thus virtually repeal the statute. It is elementary in the construction of wills that the intention of the testator must be given effect to, and to ascertain this the whole will should be looked to and taken into consideration. The testatrix in this case had the power to disinherit her after-born children, and she has seen proper to do it upon a contingency which has happened, and great as the hardship to them may be, we feel constrained to hold that the will, under this statute, is valid, and must be enforced as their mother made it and allowed it to remain, unrevoked and unchanged, till her death."

Counsel for appellant has cited *Ward v. Ward*, 120 Ill. 111, and *Salem Nat. Bank v. White*, 159 id. 136, as cases sustaining his position. Upon an examination of those cases it will be found that they differ so materially from the case under consideration that they cannot control here. In the *Ward case* the testator made provision for all of his children living at the time of his death, and the point decided was, how the various legacies should abate to allow the posthumous child to take. In the *White case* the testator made his will June 8, 1860, devising all the real estate to his widow and three children. Two years later another son was born, and a year and six months after that the testator died without changing his will. Under the facts as they there appeared the court very properly held there was nothing to show an intent on the part of the testator to disinherit the after-born child.

Bresee v. Stiles, 22 Wis. 120, has also been cited as an authority. In that case the will was executed in April, 1855, and the testator devised his property to his wife and seven children then living. Between November,

1855, and September, 1859, three other children were born, and the testator died August, 1861, without changing his will. There, as in the *White case*, the court held that there was nothing in the will showing an intent to disinherit the after-born children. As the testator made provision for all his children at the time the will was made, it was apparent that there was no intention of disinheriting those who were born after the will was made and before the testator died. While we might not concur in all that is said in the opinion in that case on the facts before the court, we find no fault with the decision.

We have also been referred to *Chicago, Burlington and Quincy Railroad Co. v. Wasserman*, 22 Fed. Rep. 872, as an authority sustaining the position of appellant. While the facts in that case are quite similar to the facts in this case, and the opinion delivered by the eminent jurist seems to sustain appellant's view of the law, we are not inclined to follow it.

We have also been referred to cases decided in other States, but upon an examination it will be found that the decisions are predicated on statutes different from ours, and what may have been decided where the facts are different or where the statute differs from ours cannot be held to be authority controlling the construction which should be placed upon our statute.

We are satisfied, after a careful consideration of the will of the testator, that it was his intention that his children, including appellant, should take no part of his estate, but that all of his estate, of every description, should go to his wife.

The decree of the circuit court will be affirmed.

Decree affirmed.

MR. CHIEF JUSTICE MAGRUDER, dissenting.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

JOHN W. CARTER.

Filed at Ottawa January 19, 1897—Rehearing denied March 12, 1897.

1. **CARRIERS**—*effect of accepting goods marked for point beyond terminus.* In the absence of restrictions, consented to by the shipper, limiting its contract of carriage to its own line, a carrier, by accepting for shipment goods marked to a point beyond its own terminus, impliedly agrees to carry the goods to their destination.

2. **SAME**—*how liability beyond terminus may be restricted.* A carrier may refuse to assume the responsibility of a through carrier, and by contract with the shipper may restrict its liability to its own line; but it cannot do so by a mere stipulation in a bill of lading not signed by the shipper, without proof that the shipper accepted the same consenting to the restriction.

3. **SAME**—*liability of carrier by rail terminates without notice to consignee of arrival.* The liability of a carrier by rail, as carrier, terminates upon the delivery of the goods at a secure depot or warehouse at the point of destination, though beyond its own line, without notice to the consignee of the arrival or warehousing of the goods.

4. **SAME**—*carrier by water must ordinarily notify consignee before its liability as carrier ceases.* Ordinarily, a carrier by water must notify the consignee of the arrival of goods before its liability as carrier terminates; but this notice may be waived by former course of dealing with the consignee, or by usage prevailing among carriers in the same trade at that port.

5. **SAME**—*forwarding carrier not liable for misdelivery at destination by agent of connecting line.* The liability of a forwarding carrier ceases upon the safe arrival and warehousing of the goods at their destination, and it is not liable for a subsequent misdelivery of the same by the agent of the connecting line or warehouseman.

6. **SAME**—*liability of forwarding line is not extended by agent without authority.* The liability of a forwarding carrier, after safely delivering goods at the depot or warehouse of the connecting line at the point of destination, cannot be extended by its agent, in the absence of authority, so as to cover future safe delivery to the consignee.

Illinois Central Railroad Co. v. Carter, 62 Ill. App. 618, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the HON. GEORGE F. BLANKE, Judge, presiding.

165	570
72a	108
165	570
76a	474
165	570
f92a	1629
92a	1629
165	570
200	1689

C. V. GWIN, (JAMES FENTRESS, of counsel,) for appellant:

A railroad company is not liable as a common carrier under its contract beyond its own lines. *Mulligan v. Railroad Co.* 36 Iowa, 181.

A bill of lading, like a deed poll and many other classes of contracts, is signed by one party only, and in such case the evidence of assent upon the part of the other party usually consists in his accepting and acting upon it. The evidence of assent derived from his acceptance of the contract without objection is usually conclusive. *Kellman v. Express Co.* 3 Kan. 205; *Howe v. Navigation Co.* 11 N. Y. 491; *Hopkins v. Westcott*, 7 Am. Law Reg. (N. S.) 533; *McMillan v. Railroad Co.* 16 Mich. 80, and cases cited.

Common carriers by rail are not required to give notice, and it is the duty of the consignee to be present on the arrival of the goods. *Dispatch Co. v. Halleck*, 64 Ill. 284; *Cahn v. Railroad Co.* 71 id. 96; *Railroad Co. v. Scott*, 42 id. 132.

A carrier by water may show the usage as to the manner of delivery of goods, by those engaged in the carriage of goods by water, in the particular port or at the particular place of delivery, and that he has acted according to it. Hutchinson on Carriers, sec. 366.

BAKER & GREELEY, for appellee:

Our statute prohibits a common carrier from restricting its common law liability for the carriage of goods by stipulation or limitation expressed in the receipt given for the goods. Rev. Stat. 1874, chap. 27; chap. 114, sec. 33; *Erie Railway Co. v. Wilcox*, 84 Ill. 239; *Railway Co. v. Jaggerman*, 115 id. 407; *Railway Co. v. Montfort*, 60 id. 175; *Railroad Co. v. Frankenberg*, 54 id. 88; *Express Co. v. Wilson*, 81 id. 339.

Where goods are delivered for carriage to a common carrier marked to a destination beyond the carrier's terminus, the presumption is that the carrier contracts for through carriage. *Gregg v. Railroad Co.* 147 Ill. 550; *Railroad Co. v. Wilcox*. 84 id. 239.

A bill of lading undelivered at time of shipment is not a contract. *Merchants' Trans. Co. v. Furthmann*, 149 Ill. 66.

A common carrier by water is obliged to notify the consignee of arrival of the goods before he can, by warehousing, relieve himself of his responsibility as carrier. *Steamboat Co. v. Knapp*, 73 Ill. 506; *Packet Co. v. Gattman*, 27 Ill. App. 182; *Zinn v. Steamboat Co.* 49 N. Y. 442.

Mr. JUSTICE WILKIN delivered the opinion of the court:

On the 17th of June, 1891, appellee, doing business under the name of Carter, Dinsmore & Co., by his agent, delivered to the Illinois Central Railroad Company, at Chicago, for shipment, 1000 boxes of goods called "combination sets," consisting of bottles of ink, ink stands, etc., valued at about \$1.50 each. At the time the goods were so delivered a receipt for them, filled out by the agent of Carter, Dinsmore & Co., was presented to and signed by the railroad company, which is as follows:

"CHICAGO, June 17, 1891.

"Received from Carter, Dinsmore & Co., 275 Kinzie street, on Illinois Central Ry., the following articles in good order, to be delivered in like good order as addressed, without unnecessary delay:

MARKS.	(Original.)	ARTICLES.
Carter, Dinsmore & Co.		1000 boxes ink in glass.
St. Paul, Minn.		Freight guaranteed.
(In red.)		(In red.)
No. 28. Bx. Stain.		via Diamond Joe Route.

"Please send bill of lading in duplicate to Carter, Dinsmore & Co., 275 E. Kinzie street."

On the same day a bill of lading was signed by the company and received by the shipper through the mail a day or two later. It contained a stipulation limiting the liability of the company to losses occurring upon its own line. Carter, Dinsmore & Co. were both consignor and consignee of the goods, which were safely carried to East Dubuque, the terminus of the Illinois Central line, and there delivered to the Diamond Joe line of steam-

boats, and by it carried to St. Paul, arriving there on June 27, 1891. Upon their arrival the goods were stored by the steamboat line in its warehouse, to the account of the shipper. The Illinois Central Railroad Company had no depot, freight house or other place for the storage of freight in St. Paul. Nine days after the arrival, the bill of lading, endorsed, "Deliver to C. S. Eaton or to Fred H. Jackson, as per our telegraphic or written instructions, July 6, 1891.—Carter, Dinsmore & Co.," was addressed to "R. J. Williams, Esq., Agent Ill. Cen. R. R.," and received by him in due course of mail. Williams was the only agent of the railroad company at St. Paul, and his authority was limited to soliciting freight for shipment, although the company had furnished him a letter-head in which he was described as "Gen'l N. W. Agent." On the 9th of July the shipper, by letter, directed Williams to deliver 330 of the boxes to Eaton & Jackson, which order he gave to one Brockway, the agent of the Diamond Joe line in charge of the warehouse where they were stored, and Brockway delivered the goods, as directed, to Eaton & Jackson. On July 14 another order was sent to Williams by telegram, directing 100 of the remaining boxes turned over to Eaton and 100 to Jackson, and 200 to be forwarded, consigned to themselves, at places to be designated by Eaton & Jackson. This telegram was likewise turned over by Williams to Brockway, but the latter delivered the whole 400 boxes to Eaton & Jackson, which, it is claimed, they failed to account for, and this suit is to recover from the Illinois Central Railroad Company for the 200 boxes delivered to Eaton & Jackson instead of being forwarded as directed. It also appears that subsequently to the sending of the telegram above mentioned, on August 4, an order was sent to Williams similar to the first, directing 270 of the boxes to be delivered to Eaton & Jackson, which was turned over to Brockway, and the goods delivered as therein directed.

The declaration is in assumpsit, and counts upon a breach of duty on the part of the defendant, as a common carrier, for a failure to deliver the goods according to directions, to which a plea of non-assumpsit was filed, and upon issue joined the cause was tried by a jury, resulting in a verdict and judgment for the plaintiff for \$240. That judgment has been affirmed by the Appellate Court, and the case is now brought here for review, a certificate of importance having been granted by the Appellate Court.

The theory of the plaintiff's case is, that the defendant, by its receipt and bill of lading, became liable as a common carrier for the through shipment and safe delivery of the goods at St. Paul, and that such liability still existed when the 200 boxes sued for were delivered to Eaton & Jackson contrary to the order of July 14. That of the defendant is, first, that by the terms of the contract of shipment contained in the bill of lading its liability terminated with the safe delivery of the goods to the Diamond Joe line; and second, if the undertaking was for a through shipment, it discharged its duty and liability by safely carrying the goods to their destination and there placing them in a secure warehouse.

The boxes being marked for shipment to St. Paul when received by the defendant, it was its duty *prima facie* to carry to and deliver them at that place, though beyond its line; and while it had the legal right to limit that liability and refuse to take upon itself the duty of a through carrier by contracting to that effect with the shipper, it could not do so by a mere stipulation in its bill of lading not signed by the shipper, except by assuming the burthen of proof that he accepted the bill of lading consenting to such stipulation. (*Chicago and Northwestern Railway Co. v. Simon*, 160 Ill., 648, and cases there cited.) The importance of defining a common carrier's duty where goods are received for shipment marked for a destination to which its own line of carriage does not

extend, was, as shown by the opinion, fully appreciated by this court in *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88, and all the authorities bearing upon the question were then carefully considered. Since the rule as above stated was there announced, it has been well understood and uniformly adhered to as the law of this State, and although it has been frequently assailed as not in strict harmony with the decisions of other States adopting what is known as the "English rule," we are not aware that it has been found impracticable or operated unjustly. We are not therefore disposed to modify or change it, though earnestly urged to do so by counsel for defendant. Whether or not the plaintiff did consent to the stipulation was a question for the jury. The correctness of the instructions of the court on this issue is not seriously questioned, and so the finding of the jury and judgment of affirmance in the Appellate Court must be accepted as conclusively settling the fact adversely to the defendant.

It being conceded, then, that it became the duty of the defendant to safely carry and deliver the goods at St. Paul, did that duty continue to exist to the time of the alleged loss? It is well settled that the duty of a railroad company as a common carrier terminates when it has carried the goods to their destination and there placed them in its own safe depot or other warehouse. The cases in this court so holding are cited in *Gregg v. Illinois Central Railroad Co.* 147 Ill. 550. Nor is notice to the consignee of the arrival or storage necessary to terminate liability as a carrier, but upon warehousing the liability is at once changed to that of a warehouseman. The court, however, in this case, at the instance of the plaintiff, instructed the jury as follows:

2. "The jury are instructed that if they shall believe, from the evidence, that the 200 boxes of ink were delivered to Eaton & Jackson in violation of the telegraphic instructions of J. W. Carter, the plaintiff, the fact that

at the time of such wrongful delivery said boxes were in the warehouse of the Diamond Joe Line (if the jury shall believe, from the evidence, said boxes were in said warehouse at the time,) will not prevent the plaintiff from recovering, unless the jury further believe, from the evidence, that the plaintiff had notice of and accepted the conditions contained in the bill of lading introduced in evidence."

4. "The jury are instructed that if they shall believe, from the evidence, that a mistake was made in delivering the 200 boxes of ink, and that such mistake was made by the agents of the Diamond Joe Line, an independent common carrier, that nevertheless the defendant, the Illinois Central Railroad Company, is liable to the plaintiff for such wrong delivery unless the jury shall believe, from the evidence, that at the time the said ink was delivered to the defendant to be carried, the defendant, by express stipulation assented to by the plaintiff or his agent, limited its liability to loss occurring on its own line."

The action being against the defendant as a carrier, these instructions are clearly erroneous under the foregoing decisions, unless it can be said that the duty of the defendant was other than that of a common carrier by rail. In other words, if the connecting line which carried the goods to their destination had been a carrier by rail, their safe carriage and storage at St. Paul would have terminated the liability as a carrier, whether the defendant's liability was limited to its own line or not. It is insisted, however, that, the Diamond Joe line being a carrier by water, the liability could only be changed to that of a warehouseman by the storage of the goods upon due notice to the shipper of their arrival. Without determining the question as to whether, under the circumstances of this case, the Illinois Central Railroad Company assumed the liability of a carrier by water, (the agent of the shipper having filled up the receipt for the goods, thereby *prima facie* himself selecting the steamboat line as the

connecting carrier,) we think it clear from all the facts in the case that the instructions above set forth were erroneous. While it is a general rule that a carrier by water is required to give notice of the arrival of the goods to the consignee, it is well settled that such notice may be waived, either by the previous course of dealing between the parties or by the usual course of business of carriers in the same trade in which the carrier is employed at the locality where the goods are landed,—and this whether the usage was known to the shipper or not, the rule being, that every person who contracts with another for services in his particular trade is understood to contract with reference to the usage of the trade. “The carrier may therefore show, as has been repeatedly held, the usage as to the delivery of the goods by those engaged in the carriage of goods by water in the particular port or at the particular place of delivery, and that he has acted according to it.” Hutchinson on Carriers, sec. 366, citing *Dixon v. Dunham*, 14 Ill. 324; *Farmers and Mechanics' Bank v. Champlain Transportation Co.* 23 Vt. 186; *McMaslins v. Pennsylvania Railroad Co.* 69 Pa. St. 374; *Turner v. Huff*, 46 Ark. 222.

It was shown upon the trial of the case, and not denied, that the disposition of the goods at St. Paul was in strict accordance with the custom and usage of steamboat carriers at that point. We are also of the opinion that it must be inferred from the conduct of the shipper, in the absence of proof to the contrary, that he had actual notice of the arrival of the goods prior to the alleged wrongful delivery to Eaton & Jackson. On the 6th of July he sent a general order to Williams for the future delivery of the goods as “per our telegraphic or written instructions.” On the ninth of that month he gave an order for the delivery of 330 boxes to the same parties, whereas the mistake did not occur until after the order of July 14. Certainly, it cannot be said there was no evidence tending to prove a waiver of notice of the arrival of the goods

or of actual notice of that fact, and therefore, in view of the case, it was erroneous to tell the jury, as was done by the instructions of the court, that the defendant was liable as a common carrier, notwithstanding the storage of the goods, unless it was shown that the shipper expressly assented to the limitation of the defendant's liability for loss or damage occurring on its own line.

As to the suggestion that plaintiff's dealings with the goods through Williams strengthens the case against the defendant, we think the opposite effect must be given to those transactions. Those acts were in no proper legal sense dealings with the defendant. Williams was not, in fact, the agent of the Illinois Central Railroad Company for the delivery of goods at St. Paul, and this is not denied. The fact that he appeared, from the letter-heads furnished by the company, to be its general agent in no way influenced plaintiff's conduct, and therefore he is not in a position to insist that he was in any way misled thereby to his prejudice. By his order of July 6 plaintiff undertook to authorize Williams to deliver the goods from time to time as he might direct, and by his subsequent orders of July 9 and 14 and August 4 made him his own agent to transfer the goods. On the theory that it was the duty of the defendant to safely carry and deliver the goods in St. Paul, it was equally the duty of the consignor, who was also the consignee, to receive them upon their arrival. Thus it was said in *Tarbel v. Royal Exchange Shipping Co.* 110 N. Y. 170 (6 Am. St. 350): "The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier can not be continued at the option or to suit the convenience of the consignee. The latter is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer by such failure terminates." *Red-*

mon v. Liverpool Co. 46 N. Y. 578; *Hedges v. Hudson River Railroad Co.* 49 id. 223.

It would be unreasonable to hold that the shipper could deal with the goods as he claims to have done and still hold the defendant to the strict liability of a common carrier during the indefinite period in which he undertook to leave them in the hands of the carrier for distribution. Even if Williams had been the agent of the defendant for the delivery of the goods, we do not understand that he could thus extend the liability of the defendant by an arrangement with the shipper for their distribution in the future without some evidence showing he had authority to do so. We think the defendant's liability terminated with the safe carriage and warehousing of the property at St. Paul, and that plaintiff must look to the Diamond Joe line, as warehouseman, for any mistake or wrongful disposition of the same by it.

The judgment of the circuit and Appellate Courts will accordingly be reversed, and the case will be remanded to the former court with directions to proceed according to the views herein expressed.

Reversed and remanded.

LOUISA STEGER

v.

JOHN V. STEGER.

Announced orally at Ottawa March 6, 1897.

1. APPEALS AND ERRORS—*right of appeal is limited to parties to suit.* The right of appeal is statutory only, and by section 90 of the Practice act, as amended in 1877, (Laws of 1877, p. 153,) is limited to parties to the suit.

2. SAME—*act concerning solicitor's fees in divorce suits is for the wife's benefit.* The provision of the Divorce act, which also applies in separate maintenance, (Rev. Stat. 1874, p. 421, sec. 15,) concerning the wife's solicitor's fees, is for the wife's benefit, and if she refuses

165	579
173	115
71a	490
165	579
74a	886
165	579
179	85

to appeal from an order disallowing such fees her solicitor is not entitled to appeal, though he gives her an indemnity bond.

3. SAME—*advancing of master's fees by solicitor does not entitle him to an appeal.* The fact that the solicitor for the wife in an action for separate maintenance had advanced the master's fees does not give him the right to appeal from an order of the court refusing to require the husband to pay the money so advanced.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

H. H. ANDERSON, for appellant.

W. J. LAVERY, for appellee.

Mr. JUSTICE CARTWRIGHT announced the opinion of the court:

Louisa Steger was complainant in a bill for separate maintenance filed in the circuit court of Cook county against her husband, John V. Steger, the appellee. On her motion temporary alimony was allowed to her, including a solicitor's fee of \$100, which was paid to Hervey H. Anderson, her solicitor. The parties afterward, before a hearing, settled their marital difficulties and the complainant returned to her husband. Said solicitor for complainant then entered a motion for an additional allowance of solicitor's fees, and there was a cross-motion by the defendant to dismiss the bill of complaint. On a hearing of these motions the court dismissed the bill, but ordered the defendant to pay to the clerk of the court, for the use of complainant, \$1028 as an additional solicitor's fee and \$45 master's fee which said solicitor had paid, making \$1073, which the clerk, when paid to him, was ordered to pay over to said solicitor. From this decree the defendant appealed to the Appellate Court for the First District, and that court affirmed the decree except as to the payment of any moneys by John V. Steger, the

defendant in the bill and appellant in that court, and in so far as it directed such payment by him it was reversed. The record of the Appellate Court shows that Louisa Steger refused to take any appeal from that judgment, and an order was made allowing the solicitor, Hervey H. Anderson, to appeal in her name, on giving bond and a bond of indemnity to her. These bonds were filed, and afterward the court granted an appeal to the solicitor in his own name. Appellee moves to dismiss the appeal, on the ground that Anderson was not a party to the suit in the circuit or Appellate Court and had no right to appeal.

The right of appeal is sought to be sustained, on the ground that the solicitor had an interest in the decree, and that this court entertained a writ of error in *McCulloch v. Murphy*, 45 Ill. 256, sued out by the solicitors of Mrs. Murphy. In that case there was a joinder in error, and no question was made or decided as to a right of appeal. It is not authority upon that question. The right of appeal exists only by virtue of the statute, and has no existence apart from it. Section 90 of the Practice act, which gives and regulates the right, provides that "any party to such cause shall be permitted to remove the same to the Supreme Court by appeal," upon certain conditions. Anderson was not a party to the suit, and no right was given to him by this statute to appeal.

The court was authorized to grant an allowance to appellee to enable her to prosecute her suit "as in cases of divorce." Section 15 of the Divorce statute authorizes the court to "require the husband to pay to the wife, or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit." The allowance authorized is to the wife, and to be paid to her or for her use. So far as the master's fees are concerned, the solicitor who paid them has no more right of appeal than the master would have had if not paid to him. It will hardly be claimed that the master could have appealed. If he could, then each

witness and every officer to whom fees were due and unpaid in a divorce suit could have an appeal from a refusal to compel the defendant to pay money to the complainant sufficient to pay him. The solicitor's fee is on the same footing as any other expense of maintaining or defending the suit. The right given by the statute is in the wife, and the case does not come within any rule authorizing an appeal against her will. She has control of her own suit. *McCulloch v. Murphy, supra.*

The rule that the right of appeal is limited to parties to the suit is declared in the following cases: *Rorke v. Goldstein*, 86 Ill. 568; *Hesing v. Attorney General*, 104 id. 292; *Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Surwald*, 150 id. 394.

The motion is sustained and appeal dismissed.

Appeal dismissed.

THE CITY OF CHICAGO

v.

FREDERIC C. WEIR *et al.*

Filed at Springfield March 12, 1897.

1. CONTRACTS—in construing a contract partly written and partly printed, written part controls. In construing a contract drawn upon a printed form by filling in blank spaces with writing, the written part will, in case of conflict, control.

2. SAME—when money erroneously paid contractor is not paid under mistake of law. Where a contract for constructing a water tunnel provides that the contractor shall put in the "back masonry" without extra pay, money paid to him for performing such work is not paid under mistake of law, and may be applied, as over-payment, to other parts of the contract.

3. SAME—when clause of specifications does not modify provision of contract. A provision in a contract for constructing a water tunnel and shaft, concerning an additional compensation to the contractor for rock excavation in both tunnel and shaft, is not modified by a clause in the specifications making additional provision for rock excavation in the tunnel alone.

165	582
179	454

165	582
d91a	*443
d91a	*452

165	582
204	1818
e205	405
e205	*484
e205	*448
e205	*444
e205	453
e205	455
205	456

4. APPEALS AND ERRORS—*when appellee need not assign cross-error.* Where, in an action to recover a balance due on a contract, the judgment rendered is satisfactory to the defendant, in amount, he need not, upon the plaintiff appealing therefrom, assign as cross-error the trial court's disallowance of his claim of over-payment in order to have the benefit of the same in the Appellate Court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

WILLIAM G. BEALE, Corporation Counsel, BYRON BOYDEN, and EDWARD B. BURLING, Assistants, for appellant:

The primary consideration in construing an instrument of writing is to ascertain the intention of the parties. *Colton v. Field*, 131 Ill. 398.

All parts of an instrument must be construed in such a way as to give force and validity to all of them, and to all the language used, where that is possible. *Schneider v. Turner*, 130 Ill. 28; *Railroad Co. v. Aurora*, 99 id. 214.

All provisions of a contract are to be considered, and the general design must not be frustrated by allowing too much force to single words or clauses. 'Beach on Contracts, sec. 711.

L. D. CONDEE, and LOUIS BOISOT, Jr., (T. A. MORAN, of counsel,) for appellees:

Where a printed form is used to be filled by writing, the written part will control the printed part in construing the contract. *Holmes v. Parker*, 25 Ill. App. 225; *Express Co. v. Pinckney*, 29 Ill. 392.

A construction of a contract adopted and acted on by a party to it is binding on him. *Parmalee v. Hambleton*, 24 Ill. 605; *Leavers v. Cleary*, 75 id. 349; *Storey v. Storey*, 125 id. 608; *Garrison v. Nute*, 87 id. 215; *People v. Murphy*, 119 id. 159; *Vermont Street M. E. Church v. Brose*, 104 id. 206; *Hall v. Bank*, 133 id. 234; *Burgess v. Badger*, 124 id. 288; *Chicago v. Sheldon*, 9 Wall. 50.

Money voluntarily paid to another under a mistake of law cannot be recovered back. *Elston v. Chicago*, 40 Ill. 514; *Bilbie v. Lumbe*, 2 East, 469; *Lester v. Mayor*, 29 Md. 415; 15 Am. & Eng. Ency. of Law, 676.

Even courts of equity will not lend their aid to relieve against mere mistakes of law. *Fowler v. Black*, 136 Ill. 878.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of assumpsit brought by appellees, who compose the firm of Weir, McKechney & Co., against the city of Chicago, to recover money alleged to be due for work done in the construction of a water tunnel and shafts in the city of Chicago under a written contract. The items of plaintiffs account, as appears from the record, (deducting fifteen per cent which does not fall due, under the contract, until the completion of the work,) are as follows:

1. Rock excavation within the cross-section lines of the tunnel.....	\$13,530.50
2. Removal of rock taken from outside said cross-section lines.....	3,503.70
3. Back masonry put in during July, 1896.....	4,492.25
4. Erroneous deduction from previous back masonry (third ring of brick).....	3,952.50
5. Rock excavation in shafts.....	524.45
6. Extra work caused by error in city surveys.....	3,878.60
Total.....	\$29,882.00

In the circuit court a stipulation was entered into by counsel for the respective parties, to the effect that on the trial any evidence might be introduced under the common counts, and any relief granted and recovery had by plaintiffs, which would be competent if the matters in issue were specially pleaded; also, that defendant might plead the general issue and introduce any competent evidence material to the matters involved. It was further stipulated:

"A written contract, bearing date October 19, 1895, was entered into between the said parties for the con-

struction of section 3 of the north-west water tunnel and shafts, as per contract, specifications and proposal or bid, copies of which are hereto attached and made a part of this stipulation. Under the contract the plaintiffs have constructed about 3000 feet of tunnel, and all the portion of the tunnel so constructed has been through solid rock, where blasting has been required. The drilling and blasting have created cavities outside of the regular dimensions or cross-section lines of the tunnel, which cavities the city has required the contractors to fill with solid brick masonry. In the interpretation of the said contract and the carrying out of the work, various contentions and differences have arisen between the parties. The points upon which the differences have arisen may be stated as follows:

"First—Whether or not the contractors are entitled to compensation at the rate of two dollars for rock excavation per cubic yard within the cross-section lines of the tunnel over and above the cost per lineal foot of tunnel or shaft, where the work is wholly in rock.

"Second—Whether or not the contractors are entitled to compensation for the removal of rock which breaks outside of the cross-section lines as indicated by the engineer.

"Third—Whether the contractors are entitled to compensation for filling in with solid brick masonry outside the cross-section lines of the tunnel, called technically 'back masonry.'

"Fourth—Whether any allowance in respect to the third ring of brick mentioned in the contract, where such third ring is omitted by the permission of the engineer, should be made either in favor of the contractors or of the city."

In the circuit court, on a trial without a jury, the court disallowed all the items contained in plaintiffs' account except the last, \$3878.60, for which judgment was entered. To reverse the judgment the plaintiffs appealed to the

Appellate Court, and there it was held that plaintiffs were entitled to recover the first, fifth and sixth items of the account, amounting to \$17,933.55, but judgment was rendered for \$12,003 only, the deduction being made on account of money which had been paid plaintiffs for "back masonry." To reverse the judgment of the Appellate Court the defendant, the city of Chicago, has appealed, and plaintiffs complain of the deduction made by the Appellate Court, by assigning cross-errors.

The contract contained this provision: "That the said parties of the first part, for and in consideration of the payments to be made by the said city of Chicago, as hereinafter set forth, hereby covenant and agree to build and construct a water tunnel and shafts in said city, from a point on North Green street near Grand avenue, in a northwesterly direction, to a point in section 35, township 40, range 13, east of the third principal meridian, according to the terms, conditions and directions set forth in the plans and specifications hereto attached and made a part hereof, same being designated in said specifications as '3d section, eight feet internal diameter.'"

The contract provided as follows: "The said city of Chicago hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified, to be kept and performed by the said parties of the first part, to pay to said parties of the first part when this contract shall be wholly carried out and completed on the part of said contractors, and when said work shall have been accepted by the said commissioner of public works, the following prices, to-wit: Shafts, ten feet internal diameter, \$69.50 per lineal foot; tunnel in earth, eight feet internal diameter, \$16.65 per lineal foot; tunnel in rock, eight feet internal diameter, \$15.90 per lineal foot; rock excavation over and above cost of lineal foot of tunnel or shaft, \$2.00 per cubic yard; cast iron in covers, etc., five cents per pound."

The principal question presented for our consideration by the record is, whether the plaintiffs were entitled to recover two dollars per cubic yard for rock excavated from the shafts and tunnel within the cross-section lines, as declared in the fourth clause of the contract as above set out, providing for payment, or whether that provision of the contract is limited to cases where the tunnel is partly in earth and partly rock. The disposition of this question involves a construction of the contract. It will be observed that the contract provides for only two kinds of tunneling,—one through earth, the other through rock. There is no clause in the contract fixing any price whatever for tunneling through a mixture of rock and earth or a mixture of any other substance. Moreover, it is a significant fact that the price per lineal foot fixed by the contract for rock excavation is seventy-five cents less than the sum to be paid for earth excavation, the former being \$15.90 per lineal foot while the latter is \$16.65. What explanation can be given of the fact that a less price is provided for digging through hard rock than earth, unless that clause giving two dollars per cubic yard for the rock to be excavated was intended to make up the difference? It needs no evidence to establish the fact that it costs more to tunnel through rock than earth. But if such evidence is required it will be found in the record. Jackson, the city engineer, testified: "Rock is more expensive unless you have very bad earth. Of sections 1, 2 and 3, section 3 is the most expensive, excepting at those points where they encounter quicksand. We paid an extra price for that. I should say the difference in the cost between earth and rock was from three dollars to four dollars per foot on the average material, as we find it through here. There are places where the rock would cost a good deal more than that over the earth. As to the rock being cheaper than the dirt in this contract, I cannot account for the contractors' bid." Indeed, it seems impossible to account for the contractors' bid if the theory of the city

is to be adopted. If the plaintiffs are allowed two dollars for rock excavation over and above cost of lineal foot of tunnel or shaft, they will then receive no more than reasonable pay for their work, in view of the amount (\$16.65) allowed for tunneling in earth, which is not claimed to be excessive. The amount of rock taken out for every lineal foot of tunnel, as shown by the evidence of the city engineer, would be 2.65 cubic yards. At two dollars a cubic yard that would make an increase of \$5.30 per lineal foot of tunnel. This amount added to the price agreed to be paid for tunneling in the rock, \$15.90, will make \$21.20, which is only \$4.55 more than the contract price for tunneling in earth, and the engineer testified that the work in rock cost four dollars or more than the work in earth.

As has been seen, the first clause of the contract providing for payment for the work provides that \$69.50 shall be paid per lineal foot for shafts ten feet internal diameter; the second, tunnel in earth, eight feet internal diameter, \$16.65 per lineal foot; the third, tunnel in rock, eight feet internal diameter, \$15.90 per lineal foot; the fourth, rock excavation over and above cost of lineal foot of tunnel in shaft, two dollars per cubic yard. These provisions of the contract are plain and free from ambiguity, and, giving the language used in the contract its plain and ordinary meaning, it seems evident that plaintiffs were clearly entitled to recover two dollars per cubic yard for all rock excavated, in addition to the cost of lineal foot of tunnel or shaft.

But it appears that the specifications, which are by the terms of the contract made a part thereof, contain the following provision: "When the tunnel is partly in earth and partly in rock the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth." And it is claimed that the fourth clause of the contract, providing for payment of rock excavation, was only intended to apply when the tunneling was partly in

rock and partly in earth. It seems that the contract was drawn on a printed form used by the city, with blanks to be filled in by writing. The clause referred to from the specifications is a part of the printed form, while that part of the contract heretofore set out providing for payment for rock excavation is written in the contract with pen and ink. The law is well settled that where a printed form is used, to be filled up by writing, the written part will control in the construction of the contract. (*American Express Co. v. Pinckney*, 29 Ill. 392.) In so far, therefore, as the clause in the specifications may conflict with that part of the contract in regard to rock excavation, the latter, having been written in the contract, must control. Moreover, it will be observed that plaintiff's contract calls for two kinds of excavation,—tunnel in rock and tunnel in earth,—while this provision refers to tunnel that runs partly in earth and partly in rock, and it can have no application to the plaintiffs' contract or the tunnel constructed by plaintiffs, which was wholly in rock. If, during the progress of the work, the plaintiffs should run into a formation composed partly of earth and partly of rock, and the tunnel would have to be constructed through that formation, then the clause in the specifications would apply; but that clause has no bearing whatever on a tunnel wholly in rock or wholly in earth.

There is another fact which has an important bearing on the construction of the contract. As before observed, the contract declared that plaintiffs should be paid for rock excavation over and above cost of lineal foot of *tunnel* or *shaft*, two dollars per cubic yard. Now, it is claimed on behalf of the city of Chicago that the above language of the contract is qualified by that clause of the specifications which says, "when the *tunnel* is partly in earth and partly in rock the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of *tunnel in earth*."

These two provisions, upon close examination, do not seem to include the same thing. The clause in the contract includes rock excavation both in tunnel and shaft, while the specifications make provision for rock excavation in tunnel only. The clause in the specifications, as it reads, has no reference or application to rock taken from shafts, and as it cannot be applied to shafts without disregarding the plain language used, it is difficult to conceive upon what ground it can be contended the clause in the specifications was intended to limit or qualify that clause in the contract relating to rock excavated both from *tunnel* and *shaft*.

The Appellate Court, in arriving at the amount for which the plaintiffs were entitled to judgment, made a deduction from the amount they were entitled to receive on account of rock excavation at two dollars per cubic yard, of \$5930.35, which plaintiffs had received from the city for "back masonry." The plaintiffs object to the deduction made, for two reasons: First, that the city did not assign error on the judgment of the circuit court disallowing this claim; and second, that such sums were paid under a mistake of law, and cannot be recovered.

In blasting the opening in the rock for the tunnel, owing to the formation of the rock the opening was in many places made larger than was required for the tunnel. This space had to be filled up with brick work, which is called "back masonry." For this work appellees had asked and received compensation up to a certain date, amounting to \$5930.35. As to the first contention, it is sufficient to say that in the circuit court the city was successful, and no greater judgment was rendered than the city conceded to be correct, and hence it had nothing to complain of and no reason existed for assigning cross-errors. Nor do we think the money was paid under a mistake of law. The money was paid on the contract for work done under the contract, and it amounted to nothing more than an over-payment, which might properly be

deducted from whatever sum was due the plaintiffs for any portion of the work. The fact that the money may have been received on a claim for back masonry is a matter of no moment. If nothing was actually due plaintiffs on such a claim then they would be required to apply the money as a payment on whatever was due them under the contract.

In regard to the question whether plaintiffs are entitled to compensation for filling with masonry the space between the brick line of the tunnel and the irregular excavation of the rock, that is settled by a plain provision found in the specifications, as follows: "In every instance all spaces left between the outside of the regular brick work and the excavation shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material." This is so plain that argument in support of the language used is unnecessary.

In regard to an allowance where the third ring of brick mentioned in the contract is omitted by permission of the city engineer, the Appellate Court held that no allowance should be made either party, and in this we think the court was correct. The specifications contain this provision: "When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick, and in all cases the masonry shall be brought to a true circular section." If an allowance had been intended to either party where the third ring of brick should be omitted, the contract or specifications would have contained a clause on that subject.

We think the judgment of the Appellate Court was correct, and it will be affirmed.

Judgment affirmed.

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73a 568

THE LANCASHIRE INSURANCE COMPANY

592:40 LRA 24

v.

JOHN CORBETTS, for use, etc.

Filed at Ottawa January 19, 1897—Rehearing denied March 27, 1897.

1. JURISDICTION—*situs of debt is at creditor's domicil.* The *situs* of a debt for purposes of jurisdiction, so far as so intangible a thing as a debt can be said to have a *situs*, is generally held to be at the domicil of the owner of the credit.

2. SAME—*jurisdiction in garnishment does not depend upon situs of debt.* The jurisdiction of the Illinois courts, in garnishment, over residents of this State owing debts to parties residing in other States, depends, not upon the *situs* of the debt, but upon the fact that the garnishee is subject to process of the courts of Illinois.

3. SAME—*rule that jurisdiction in garnishment does not depend on situs is limited to debts.* The rule that jurisdiction in garnishment does not depend on *situs* applies only to debts, and has no application to attachment or garnishment proceedings to reach tangible property having an actual *situs* in another State.

4. SAME—*foreign insurance company may be garnished for debt due resident of another State.* A foreign insurance company having property and agents in Illinois, and transacting business here, may be garnished in the courts of this State to reach a debt due a resident of another State.

5. SAME—*rule that court first acquiring jurisdiction will retain it does not apply to courts in different States.* The rule that where courts have concurrent jurisdiction the one first acquiring jurisdiction of a suit will retain it until the matters are finally disposed of, does not apply to courts in different States.

6. CONFLICT OF LAWS—*when courts of different States have concurrent jurisdiction.* Where a corporation is subject to the service of garnishment process in different States the courts of each have concurrent jurisdiction, and neither the fact that the creditor resides in one State, nor the fact that another State has issued process, will operate to confer exclusive jurisdiction on the courts of either.

7. SAME—*judgment against garnishee in one State bars garnishment suit in another.* Where a debtor is garnished for the same debt by different parties in courts of concurrent jurisdiction in different States, the recovery and payment of judgment in one State, after full disclosure of the pendency of the other suit and without collusion by the garnishee, bar a recovery against him in the other State, regardless of priority of the suits.

Lancashire Ins. Co. v. Corbett, 62 Ill. App. 236, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

MYRON H. BEACH, for appellant:

Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself. Drake on Attachment, sec. 462.

A debt is intangible, and therefore its *situs* must be at either the residence of the debtor or creditor. *Renier v. Hurlbut*, 81 Wis. 24; *Railroad Co. v. Pennsylvania*, 15 Wall. 300; *Railroad Co. v. Sharritt*, 43 Kan. 375; *Bowen v. Pope*, 125 Ill. 28; *Haggerty v. Ward*, 25 Tex. 144; *Williams v. Ingersoll*, 89 N. Y. 508; *Plimpton v. Bigelow*, 93 id. 596; *Douglas v. Insurance Co.* 63 Hun, 393.

When, by a court having jurisdiction of the action and of the person of a garnishee, judgment is rendered against him, and he has satisfied it in due course of law, such judgment is conclusive against parties or privies of all matters of right and title decided by the court, and constitutes a complete defense to any subsequent action by the defendant against the garnishee for the amount which the latter was compelled to pay,—and this though the court be a foreign tribunal. Drake on Attachment, sec. 706; *Minard v. Lawler*, 26 Ill. 301; *Zepp v. Hager*, 70 id. 223; *Craft v. Clark*, 31 Iowa, 77; *D'Arcy v. Ketcham*, 11 How. 155; *McElmoyle v. Cohn*, 13 Pet. 312.

FLOWER, SMITH & MUSGRAVE, for appellee:

A non-resident can be garnished for a debt due to a non-resident under a contract made in another State. *Railroad Co. v. Barron*, 83 Ill. 65; *Railroad Co. v. Crane*, 102 id. 249; *Railroad Co. v. Dougan*, 142 id. 248; *Roach v. Insurance Co.* 2 Ill. App. 360; *Glover v. Wells*, 40 id. 350; *Hender-*

son v. Schass, 35 id. 155; *Insurance Co. v. Hettler*, 46 id. 416; Shinn on Attachment, sec. 493, and cases cited; Waples on Attachment, (2d ed.) 322; *Harvey v. Railroad Co.* 50 Minn. 405; *Manufacturing Co. v. Lang*, (Mo.) 27 L. R. A. 651; *Connor v. Insurance Co.* 28 Fed. Rep. 549.

Wherever the creditor might maintain his suit to recover the debt there it may be attached as his property, provided the laws of such place authorize it. *Manufacturing Co. v. Lang*, 27 L. R. A. 651.

Renier v. Hurlbut, 81 Wis. 24, relied upon by counsel for appellant in his brief, was decided with reference to a local statute, and is opposed to the law of this State. The pendency of an attachment suit in one State may be successfully pleaded in abatement in any attachment suit subsequently brought in another State, and the rights of the garnishee fully protected. *Roach v. Insurance Co.* 2 Ill. App. 360; *Drake on Attachment*, (7th ed.) 700.

MR. JUSTICE CARTER delivered the opinion of the court:

The appellant insurance company had its domicile of origin in Great Britain, but by compliance with the laws of each of the States of Illinois and Wisconsin relating to foreign corporations it transacted business and kept agents and property in both States. In a proceeding by foreign attachment in the circuit court of Cook county against one Corbetts, who lived in Wisconsin, appellees Wilson Bros. & Co., on October 6, 1892, garnished appellant, by process that day served on its agent in Chicago, for a claim of Corbetts against it upon an insurance policy on a stock of goods in Wisconsin, which goods had on October 3 been partially destroyed by fire. Afterward, but in the same month, garnishment proceedings were instituted in Wisconsin by one Dowling, a creditor of Corbetts; and appellant, by service upon its agent in Wisconsin, was garnished for the same debt owing to Corbetts. Under the facts as they appear, we must hold that the effect of what was done in Wisconsin was that

appellant set up in the proceedings there the prior garnishment in Illinois, alleging that the jurisdiction here was prior and exclusive, but it was adjudged by the Wisconsin court, (a court of competent jurisdiction,) following decisions of the Supreme Court of that State, that the circuit court of Cook county, Illinois, was without jurisdiction in the premises, and that its proceedings were no defense to the suit in Wisconsin. Judgment was then rendered against the garnishee, which it paid under the compulsion of the judgment and of the laws of Wisconsin, which provided that no insurance company against which any judgment existed and remained unpaid sixty days after its rendition should issue any new policy in that State, and prescribed heavy penalties against officers and agents who should violate the statute.

After the first answer in this cause, filed by the garnishee in the Cook county circuit court October 6, 1872, denying all indebtedness to Corbetts, appellees took no further action for nearly two years, nor until the judgment in Wisconsin had been paid, when they filed additional interrogatories. By an amended answer to these interrogatories appellant set up the Wisconsin proceedings, statute, judgment, and the payment of the judgment; also, that at the time of the service of the writ in the case at bar no proofs of loss had been made by Corbetts, and therefore the alleged debt was contingent and uncertain, as it was not by the policy payable until sixty days after the receipt of proofs of loss, and that it was not therefore subject to garnishment. Upon a trial by the court upon agreed facts the defense was overruled, and judgment rendered against appellant for the amount shown by its answer to have become due and payable to Corbetts under the policy and by virtue of the fire loss. The Appellate Court having affirmed the judgment, appellant now brings the record to this court, insisting that the law has not been properly adjudged to it in the courts below; that, having fully discharged its duty

under the laws of both States, it should not be compelled to pay the debt twice.

The arguments of counsel have been chiefly addressed to the second question, viz., whether, at the time of the service of the writ upon the garnishee, the alleged debt to Corbetts was anything more than a contingent liability, dependent upon the compliance by Corbetts with the provision of the policy requiring proofs of loss to be furnished by him to appellant within a certain time. But from the view we take of the case it will not be necessary to consider this question. We are free to say, at the outset, that we cannot look with favor upon any construction of the law which would impose a double liability upon a garnishee who, without collusion, fraud or negligence, has undertaken to fully discharge its duties under apparently conflicting laws of different jurisdictions. It is, of course, true, that every State must enforce its own laws within its own borders for the protection of its own citizens; but either the law, or the construction of it by the courts, in one or the other of the States is contrary to natural justice, which requires of a garnishee standing indifferent between creditors contending in different States for the same debt, the payment of that debt more than once.

It seems to be the doctrine in Wisconsin, as laid down by the Supreme Court of that State in *Renier v. Hurlbut*, 81 Wis. 24, that in garnishment proceedings the jurisdiction of the court is dependent upon the *situs* of the debt sought to be appropriated to the payment of the plaintiff's demand, and that if the *situs* of the debt is without the jurisdiction, the court has no power to proceed or to render any judgment against the garnishee. Now, it is the generally accepted doctrine that, so far as so intangible a thing as a debt can be said to have a *situs*, it follows the creditor or owner of the credit, and is at his domicil. (*Holbrook v. Ford*, 153 Ill. 633; *Pomeroy v. Rand*, *McNally & Co.* 157 id. 176; *Wyeth Hardware and Manf. Co. v.*

Lang, 127 Mo. 242; Story on Conflict of Laws, sec. 362; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259.) And the notion that the *situs* of the debt determines the jurisdiction of the court in garnishment has led to the creation of the fiction that for the purposes of garnishment the *situs* of the debt is changed and becomes the place where the garnishee lives, and not the domicile of his creditor. As before said, the proceedings must be had in the jurisdiction of the garnishee, where service can be had upon him, but it does not at all follow that it is because that is the *situs* of the debt. Thus, it is said by Shinn in his late work on Attachment and Garnishment (p. 863): "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this State to recover the debt in respect to which the garnishment process is served. This is in harmony with the rule before stated, that the demand must be one on which an action at law could be brought by the principal debtor."

Take the case at bar: Actual service of process in the different suits could be and was had on the appellant company in both States,—Illinois and Wisconsin,—and it was subject to garnishment in both States, and it would have been subject to similar proceedings in any other States in which, in compliance with their laws, it had established itself for business purposes. Evidently, however, this would not be so for the reason that the debt had a *situs* in each and all of such States at one and the same time, when it also had a *situs* at the domicile of the creditor of the garnishee, but the true reason is that the garnishee insurance company was liable to suit by its creditor for the collection of the debt in each and all of the States where it had so established itself for business purposes. To hold that the *situs* of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachments, for the very ground of a foreign attachment is

the non-residence of the principal defendant, who, in cases of garnishment, is the creditor of the garnishee, and if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides,—that is, where the debt has its *situs*,—it can not be reached in foreign attachment at all. This is clearly pointed out in an exhaustive opinion by Pitney, V. C., in *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, where he shows the utter fallacy of the reasoning used to support decisions that jurisdiction in such cases depends on the *situs* of the debt attached or garnished. A further reason readily presents itself in the fact that no proceeding in garnishment of any kind can be maintained where the principal defendant has his domicil,—that is, at the *situs* of the debt,—unless the debtor to be served with garnishee process is within the jurisdiction of the court. The principal defendant in attachment proceedings may, except for the purposes of obtaining a personal judgment, be brought into court by constructive service, but jurisdiction of the garnishee can be obtained only by actual service of process. 2 Shinn on Att. and Gar. 1000.

Thus it is seen that in garnishment proceedings the place of residence of the garnishee is of far more importance than the place of residence of his creditor in obtaining jurisdiction to render a judgment against a garnishee. (Ibid. sec. 490.) And it has been expressly decided by this court that a foreign corporation having property and agents in this State and transacting business here may be garnished in our courts for a debt due a resident of the State of its domicil of origin. (*Hannibal and St. Joseph Railroad Co. v. Crane*, 102 Ill. 249. See, also, *Wabash Railroad Co. v. Dougan*, 142 Ill. 248.) And the reason given is, that the foreign corporation had become subject to the process of our courts. And while the courts of Wisconsin and some other States seem to hold to the doctrine that where there is no personal service of process on the principal defendant the proceeding must be instituted

in the jurisdiction where the debt has its *situs*,—that is, the domicil of the principal defendant,—or else at the domicil of origin of the garnishee corporation, we are satisfied that the great weight of modern authority is otherwise and is in harmony with the rule adopted in this State. *Harvey v. Railway Co.* 50 Minn. 405; *Mobile and Ohio Railroad Co. v. Barnhill*, 91 Tenn. 395; *Handy v. Insurance Co.* 37 Ohio St. 366; *Wyeth Hardware and Manf. Co. v. Lang*, 127 Mo. 242; *Nichols v. Hooper*, 61 Vt. 295; *Cross v. Brown*, (R. I.) 33 Atl. Rep. 147; *Mooney v. Buford & George Manf. Co.* 72 Fed. Rep. 32.

This rule is limited, of course, to the garnishment of debts, and has no application to attachment or garnishment proceedings to reach tangible property having an actual *situs* in another State, for in such a case the property sought to be reached is without the jurisdiction of the court. 2 Shinn on Att. and Gar. 858; *Bowen v. Pope*, 125 Ill. 28; Waples on Att. and Gar. 227, 249.

It is said by all the authorities that the garnisher is, in his relation to the garnishee, merely substituted to the rights of his own debtor, and can recover only where the principal defendant could recover; (*Samuel v. Agnew*, 80 Ill. 553; *Richardson v. Lester*, 83 id. 55; 2 Shinn on Att. and Gar. 853;) and as the principal debtor could have recovered the debt garnished in the case at bar by suit in Illinois, no good reason appears why attachment and garnishment would not lie in favor of appellees here.

It is obvious, then, that the grounds upon which the Wisconsin court based its judgment are untenable. But the question still remains whether the Wisconsin court did not have jurisdiction to garnish the same debt in Wisconsin under its laws and to render the judgment it did render, and whether the payment of that judgment was not sufficient, when set up in the answer, to bar the further prosecution in Illinois of the suit at bar.

It is well settled that in ordinary actions a suit pending in one State cannot be pleaded in abatement or in bar

of another suit in a different State, but that both may proceed until judgment is rendered in one of such suits, when it may be set up in bar of the further maintenance of the other, and that it makes no difference which was first commenced. (*McJilton v. Love*, 13 Ill. 486; *Allen v. Watt*, 69 id. 655; *Dunham v. Dunham*, 162 id. 589; *Jones v. Jones*, 108 N. Y. 415.) But the suit in Wisconsin and the suit in Illinois were not between the same parties, the plaintiffs in garnishment in the two cases being different persons, and while both were proceeding to appropriate and recover the same debt to satisfy their respective demands against the same creditor of the garnishee, it has been held (whether correctly or not we are not called upon to decide) that the judgment in one such case without payment cannot be set up in bar of the other. (2 Black on Judgments, pars. 597, 801.) And it has also been held that by the service of the garnishee summons (or trustee process, as it is called in some of the States,) the garnisher acquires a contingent or inchoate lien upon the debt, or, as it is sometimes said, there has been an involuntary assignment of the same to him, dependent, of course, for its perfection upon the subsequent obtaining of judgment. (*National Fire Ins. Co. v. Chambers*, *supra*; 8 Am. & Eng. Ency. of Law, 1101, note; Shinn on Attachment and Garnishment, *supra*.) And that where, after a garnishee or trustee has been so charged by service of the process, he goes into another State and is there garnished by another person for the same debt, the first proceeding may be pleaded in abatement to the second. *Embree v. Hanna*, 5 Johns. 100; *Wallace v. McConnell*, 13 Pet. 136; *Whipple v. Robbins*, 97 Mass. 107; *American Bank v. Robbins*, 99 Mass. 313.

Thus, in *Embree v. Hanna*, *supra*, Chief Justice KENT among other things said: "If the attachment had been conducted to a conclusion and the money recovered of the present defendant, I think it could not have been made a question whether that payment would not be a bar to

the present suit. Nothing can be more clearly just than that a person who has been compelled by a competent jurisdiction to pay a debt once should not be compelled to pay it over again. It has accordingly been a settled and acknowledged principle in the English courts, that where a debt has been recovered of a debtor, under this process of foreign attachment, in an English colony or in these United States, the recovery is a protection in England to the garnishee against his original creditor, and he may plead it in bar. (Citing cases.) * * * If, then, the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending, and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors. The defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore, potior est jure.* If we were to disallow a plea in abatement of the pending attachment the defendant would be left without protection and be obliged to pay the money twice, for we may reasonably presume that if the priority of the attachment in Maryland be ascertained, that State would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here."

Substantially the same doctrine was in a similar case announced by the Supreme Court of the United States in *Wallace v. McConnell*, *supra*. So, also, to a certain extent, in *Whipple v. Robbins* and *American Bank v. Robbins*, *supra*, (Massachusetts cases,) where in the latter case it was said: "A trustee process is in the nature of a proceeding *in rem*. It is a sequestration of the debt due from the

trustee, in order that it may be devoted to the payment of one to whom the trustee's creditor is, himself, indebted;" and it was there said that the doctrine constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea.

In *Whipple v. Robbins, supra*, where it was held that the payment of the judgment rendered in Connecticut in a trustee proceeding begun after the suit was commenced in Massachusetts was not a sufficient defense to the latter suit, where such judgment was obtained by default, the court said: "But the trustee did not make any disclosure of the pendency of the present suit. He withheld from the court in Connecticut this fact essential to a fair adjudication. He allowed himself to be defaulted, and his payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action. (*Wilkinson v. Hall*, 6 Gray, 568.) What effect we should have given to the payment under the Connecticut judgment if the trustee had been compelled to pay there, notwithstanding a full disclosure of the facts, because the courts of that State had disregarded the pendency of this action and refused to adopt the principles which we regard as settled by *Wallace v. McConnell*, is a question we need not prematurely consider." In the case cited (*Wilkinson v. Hall*) the judgment, which had been paid and which was pleaded in bar, was rendered in a trustee proceeding begun after the *Wilkinson case* was commenced, and it was held not to be a good bar, because the trustee withheld facts essential to the determination of the cause, and the court said: "It is obviously just that if he has been compelled to pay the debt once by the judgment of a court of competent jurisdiction he should not be compelled to pay it again. If, therefore, the debt was recovered of the defendant under a process of foreign attachment, fairly and without collusion on his part, he may effectually plead it in bar here."

In *Garity v. Gigie*, 130 Mass. 184, where both suits were begun on the same day, but the trustee, after having been served in the morning in the State of New Hampshire, went to Boston and was there served with process in the afternoon, and judgment was first rendered in the New Hampshire case and was paid, Mr. Chief Justice GRAY, in delivering the opinion of the Supreme Judicial Court of Massachusetts, said: "That court (the New Hampshire court) having first acquired jurisdiction of the fund attached, and having, after a full disclosure by the trustee of the facts relating to the suit pending and the service made in this commonwealth, rendered judgment and execution against him upon which he has paid over the fund, that payment affords a conclusive reason for not charging him anew."

It will be noticed that in these cases more importance is given to the fact that judgment had been rendered against the trustee in a court of competent jurisdiction in another State, without fraud or collusion on his part and upon full disclosure by him, and that he had by compulsion of law paid such judgment, than to mere priority in time in the beginning of the suits or in the service of the writs. There is, moreover, a distinction, we think, between cases of the character of those above commented on and the case at bar. However slight the distinction may appear, still this is not a case where the garnishee, having been duly served with process of garnishment in one State and become subject to the jurisdiction of the court there, and bound to respond exclusively to whatever judgment that court might render, has gone into another State and there been served with another writ in favor of another creditor of the same debtor, as in *Embree v. Hanna*, *supra*. In such a case the courts of the latter State might well feel bound, upon principles of comity, to recognize as superior the right of the plaintiff in the first suit, which had attached before they had any jurisdiction of the garnishee, and thus, while fully re-

garding the rights of its own citizens, give due observance to the maxim that he who is first in point of time is stronger in right. In the case at bar the garnishee was established for business purposes and had agents in both States, and was subject to the process and jurisdiction of the courts of both States at one and the same time. While we cannot agree to the doctrine which the Wisconsin courts seem to hold, that the mere fact that because Corbetts, who owned the credit sought to be reached, resided in that State their jurisdiction was exclusive, neither can we hold that by the mere service of the garnishment writ exclusive jurisdiction was acquired by the court in this State.

If the principle stated in *Wilkinson v. Hall*, *supra*, be applied to the case at bar, (a case having other features which have been noticed and which make its application still more just,) the Wisconsin judgment, having been rendered after a full disclosure by the garnishee of this prior garnishment and without any fraud or collusion on its part, must, together with the enforced payment thereof, be held a complete bar here. This, we think, is obviously true whether, upon legal principles applicable to the facts of this case, it be held that the proceeding is in the nature of a proceeding *in rem*, or, without regard to the *situs* of the *res*, it be held that the courts of this State have jurisdiction on the ground that the garnishee is subject to the process of our courts and liable to be sued here for the recovery of the debt sought to be appropriated, for if, by legal fiction, it can be said that for the purposes of garnishment in foreign attachment proceedings the *res* was in this State and might therefore be proceeded against here, still, by no process of reasoning can it be held that it was any the less in Wisconsin at the same time, where not only the garnishee was also established for business purposes, but where its creditor, the owner of the debt, had his domicile. It was therefore a case where there was concurrent jurisdiction in the two

States and exclusive jurisdiction in neither. But the plea in abatement filed in the Wisconsin court went to the jurisdiction of that court by alleging that the jurisdiction acquired by the circuit court of Cook county was prior and exclusive, and as the jurisdiction of the Wisconsin court was concurrent with said circuit court the plea was properly held to be insufficient to abate the suit. The rule that where courts have concurrent jurisdiction the one first acquiring jurisdiction will retain it until the matter is finally disposed of does not apply, as before said, to courts in different States, but in such cases the suits may proceed concurrently, and where they are between the same parties the judgment first rendered may be pleaded in bar to the further maintenance of the other suit. This rule has been held to apply to divorce cases where the separated pair are residing and suing for a divorce each in a different State. The suits partaking of the nature of proceedings *in rem*,—that is, as against the *status* of marriage which exists between the pair in both States,—the judgment first rendered dissolving the marriage, especially where there has been personal service, is a bar when pleaded to the other suit, though such other suit was first commenced. *Jones v. Jones*, 108 N. Y. 415; *Dunham v. Dunham*, 162 Ill. 589.

If, then, the courts in both States had the right to proceed concurrently, the judgment first rendered was a valid judgment, and could be, and was, enforced against the garnishee. We have been referred to no case, and we know of none, where a second payment has been enforced upon the state of facts similar to that contained in this record. If the garnishee may, without its fault and after complying in good faith with the laws in both jurisdictions, be compelled to pay the same debt twice, it may be compelled to pay it as many times as there are jurisdictions in which it transacts business; yet it is the doctrine of all the authorities that the garnishee is not to be placed in any worse position by the garnishment

than he occupied as the debtor of the principal defendant, nor subjected to any greater liability because of the garnishment. We have established the doctrine in this State, as before shown, (*Hannibal, etc. Railroad Co. v. Crane, supra*,) that the company was subject to garnishment here because it was subject to the process of our courts, and could be sued and the debt recovered here; but it does not follow that because the writ was first served on the garnishee in this State our courts acquired exclusive jurisdiction, and that the courts of Wisconsin, where the garnishee was also subject to suit for the recovery of the same debt, must await the final action of our courts. It could not reasonably be expected that the courts of other States would accede to such a doctrine, yet nothing short of this would support the judgment appealed from, unless, indeed, it be held that it is the mere misfortune of appellant that it is liable to respond as garnishee for the same debt in every State where it may be temporarily domiciled for business purposes. And it is manifest that the grounds on which it has been held that the courts of this State will sustain garnishment proceedings against foreign corporations present and doing business in this State to reach debts owing to citizens of other States, are equally potent to support garnishment proceedings in another State at the same time in favor of another creditor.

To reverse this judgment is not to discriminate against our own citizens, as contended by counsel. They have the same facilities for obtaining the first judgment, and its satisfaction, as have the citizens of other States, and can exercise the same diligence and thus avoid conflicts of jurisdiction and the tying up of the fund by indefinite delay. We must therefore hold, that by force of the judgment, and its satisfaction, the debt which appellees were seeking to appropriate to the payment of their demand was extinguished, not by the voluntary act, fraud or collusion of the garnishee, (which, by all the authorities,

would have destroyed its immunity from a second payment,) but by compulsion of law. After such payment there was no longer in existence any debt to sustain the further proceedings by appellees in the circuit court of Cook county.

For the error in not discharging the garnishee the judgments of the Appellate and circuit courts are reversed.

Judgment reversed.

JOHN HENDERSON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

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Filed at Springfield April 3, 1897.

1. PENAL INSTITUTIONS—*the State reformatory at Pontiac is not a penitentiary.* The State reformatory at Pontiac is not a penitentiary, within the meaning of section 12 of the Reformatory act, (Laws of 1893, p. 170,) which provides against the admission to the reformatory of youthful offenders who have previously been sentenced to a penitentiary in this or another State or country.

2. SAME—*the term "State prison," used in the Reformatory act, means "penitentiary."* The term "State prison," used in section 12 of the Reformatory act, as amended in 1893, (Laws of 1893, p. 170,) means a prison of the class or grade of a penitentiary, and does not include the State reformatory at Pontiac.

3. PRACTICE—*effect of erroneous sentencing of person to penitentiary instead of to reformatory.* Where a person under twenty-one years of age has been regularly convicted of crime but erroneously sentenced to the penitentiary, directions will be given to the trial court, upon reversal on appeal, to enter a proper judgment on the verdict, and to sentence the prisoner to the reformatory.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. CHARLES G. NEELEY, Judge, presiding.

OSSIAN CAMERON, for plaintiff in error:

As the plaintiff in error was between the ages of ten and twenty-one years, and as it was not shown that he had been previously sentenced to a penitentiary, and as

the offense of which he was convicted was not a capital one, it was error to sentence him to the penitentiary. Hurd's Stat. 1893, secs. 10, 12, chap. 118; sec. 444, chap. 38.

The Reformatory act, being a penal statute, is to be construed strictly, and cannot apply to things or persons not expressly brought within its terms. *People v. Peacock*, 98 Ill. 176; *State v. Bryant*, 90 Mo. 534; Sutherland on Stat. Const. sec. 208; 23 Am. & Eng. Ency. of Law, 375; Potter's Dwarrris on Stat. 245, 247.

A reformatory is not a penitentiary. *Hughes v. Daley*, 49 Conn. 34; *People ex rel. v. Reformatory*, 148 Ill. 424.

The penitentiaries at Joliet and Chester are the only penitentiaries and State prisons known to the law of this State. Hurd's Stat. 1893, chap. 108.

Where there is nothing in a statute to indicate that a word is used in a peculiar or technical sense, it is to be taken in its ordinary and popular meaning. 23 Am. & Eng. Ency. of Law, 326, and cases in note 1.

E. C. AKIN, Attorney General, (T. J. SCOFIELD and M. L. NEWELL, of counsel,) for the People:

The term used in section 12 of the Reformatory act is "a penitentiary," and must be construed in its broadest sense, when taken in connection with the objects and provisions of the act creating the reformatory. Webster defines the word "penitentiary" as follows: "A place for penitence, or where penance is inflicted or offenses punished; especially, a house of correction in which offenders are confined for punishment and reformation, and compelled to labor; a work house." Bouvier defines the word as "a prison for the punishment of convicts."

The object of the law is to create an institution for the reformation of juvenile offenders, and not for habitual criminals. The purpose of this particular requirement is to aid the court in determining what offenders are proper subjects for the reformatory and what for the penitentiary.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Plaintiff in error was convicted in the Criminal Court of Cook county of the crime of burglary, and, being over the age of ten years and under the age of sixteen years, was sentenced December 3, 1892, to the Illinois State Reformatory at Pontiac for the term of five years. After his release he was again indicted, on January 4, 1895, jointly with John Bell, for the crime of robbery. Upon a trial for the latter offense he was found guilty by the jury, who by their verdict also found that he was between the ages of ten and twenty-one years and about the age of nineteen years, and that he had previously been convicted of a felony and confined in the State reformatory at Pontiac. The verdict fixed his punishment at imprisonment in the penitentiary for the term of fourteen years, and the court sentenced him, according to the verdict, for that term to the penitentiary at Joliet.

The reasons assigned why the judgment should be reversed are, that the court erred in admitting proof of the former conviction for the purpose of fixing the punishment of plaintiff in error at confinement in the penitentiary, and in giving the jury a form of verdict fixing such punishment and sentencing plaintiff in error to the penitentiary in accordance with the verdict.

It will not be necessary to consider whether the evidence of the former conviction and confinement in the reformatory, offered and admitted to fix the place of confinement under this conviction, was properly admitted or not, or whether it was sufficient to prove the fact, since we are of the opinion that such fact did not change the place of confinement provided for offenders between the ages of sixteen and twenty-one, or authorize the sentence imposed.

The statute regulating the sentence and place of confinement is section 12 of the act to establish the Illinois State Reformatory, in force July 1, 1891, as amended in

1893, as follows: "Any court in this State exercising criminal jurisdiction may sentence to the said reformatory any male criminal between the ages of sixteen and twenty-one, and not shown to have been previously sentenced to a penitentiary in this or any other State or country, upon the conviction in such court of such male person of a crime punishable under existing laws in a penitentiary. And the said board of managers shall receive and take into said reformatory all male prisoners of the class aforesaid who may be legally sentenced, on conviction, as aforesaid; and all existing laws requiring the courts of this State to sentence to the penitentiary male prisoners convicted of any criminal offense, between the ages of sixteen and twenty-one years, and not shown to have been previously sentenced to a State prison in this or any other State or country, shall be applicable to the said reformatory, so far as to enable courts to sentence the class of prisoners so last defined to said reformatory and not to a penitentiary: *And provided*, no person above the age of sixteen years, who has been convicted and adjudged guilty of a capital offense, shall be sentenced to the State reformatory." (Laws of 1893, p. 170.)

This section authorizes the court to sentence to the reformatory where a criminal between the ages of sixteen and twenty-one is not shown to have been previously sentenced to a penitentiary in this or any other State or country. The only penitentiaries in this State are the penitentiary at Joliet and the Southern Illinois Penitentiary at Chester, and the State reformatory is distinguished from them by every clause of the section, and especially by the provision that existing laws should be applicable to the reformatory so far as to enable courts to sentence prisoners to said reformatory and not to a penitentiary. The State reformatory is nowhere designated by the legislature as a penitentiary. The provision in the section quoted, that the crimes for which the court might sentence to the reformatory should be such

as were punishable under existing laws in a penitentiary, could only refer to the penitentiaries at Joliet and Chester, and it was also distinguished from them by the provision in the Reformatory act that the laws governing the penitentiaries in certain respects should be applicable to the State reformatory, and by other provisions in the law. The reformatory is different, in its object and purposes, from the penitentiaries, and it cannot be called a penitentiary. The main object and purpose of the reformatory, although confinement there is a punishment for crime, are the reformation of those who, from immature age, are presumably proper objects of efforts at reformation. (*People ex rel. v. Illinois State Reformatory*, 148 Ill. 413.) It also seems clear that the term "State prison," used in one part of the section, means a prison of the class or grade of a penitentiary which is specifically named, both before and after, in the section.

It follows that the finding of the jury in this case did not show that plaintiff in error had been previously sentenced to a penitentiary. The law therefore required that he should be sentenced to the reformatory. The verdict, however, was in all respects formal, and sufficient to authorize the court to pronounce a proper sentence. While the jury had no right to fix the punishment, that part of the verdict will be treated as surplusage, and the court will be directed to enter a proper judgment on the verdict. *Baxter v. People*, 3 Gilm. 368; *Martin v. Barnhardt*, 39 Ill. 9; *White v. People*, 81 id. 333; *Harris v. People*, 130 id. 457; *Wallace v. People*, 159 id. 446.

The judgment will be reversed and the cause will be remanded to the Criminal Court of Cook county, with leave to the State's attorney of that county to move for, and directions to the court to enter, a proper judgment upon the verdict sentencing plaintiff in error to the Illinois State Reformatory at Pontiac.

Reversed and remanded.

R. F. BRADFORD *et al.*

v.

THE CITY OF PONTIAC.

Filed at Ottawa November 9, 1896—Rehearing denied March 19, 1897.

1. APPEALS AND ERRORS—*objections to sufficiency of special taxation notice is waived by general appearance.* Objections to the sufficiency of a special taxation notice cannot be sustained on appeal, where, without limiting their appearance, the parties appeared in the county court and filed objections to the confirmation.

2. SAME—*objections not made below are deemed waived on appeal.* An objection that the city council, in dividing a special tax into installments, failed to include all fractional amounts in the first installment, so as to leave the others in multiples of \$100, cannot be sustained when first raised on appeal.

3. SPECIAL TAXATION—*city council may divide improvement into sections.* Where an improvement to be paid for by special taxation will benefit contiguous property in unequal proportions, the city council may divide the improvement into sections to secure practical uniformity in distributing the tax, and the Supreme Court will not assume that the division was made for an improper purpose.

4. SAME—*what is not a delegation of council's power to engineer.* A special taxation ordinance is not made invalid by a provision which confers on the city engineer a supervisory power over the improvement, to see that the work is done and the materials are furnished in conformity to the ordinance.

5. SAME—*when power conferred on engineer renders ordinance invalid.* A paving ordinance is invalid where the specifications, made a part thereof by reference, provide that inlets and catch-basin covers be placed at street corners where directed by the engineer, and that cross-walks be built in such form as directed by him at street intersections and other points, according to his grades and plans.

6. SAME—*provision that engineer may make alterations changing cost of improvement is fatal.* Specifications made a part of a paving ordinance by reference render it invalid, where they empower the engineer, in his discretion, to make alterations which increase or diminish the expense of the improvement, to determine the value of such alterations, and to add the same to or deduct it from the contract price.

7. SAME—*mere irregularities which work no injury are not available as objections.* That a special taxation ordinance provides that the tax installments shall not begin to draw interest until a later day than that allowed by statute is not available as an objection to the confirmation of the assessment roll.

165	612
185	79a 170
185	612
185	439
165	612
e202	810
f202	811
165	612
207	168

8. SAME—*property owner entitled to jury trial on question of benefits.* Under the statute (Laws of 1895, p. 100,) the owner of property specially taxed for a local improvement is entitled to a hearing by a jury upon the question whether the amount taxed against his property exceeds the benefits.

APPEAL from the County Court of Livingston county; the Hon. C. M. BARICKMAN, Judge, presiding.

R. R. WALLACE, R. S. MCILLDUFF, and G. W. PATTON,
for appellants.

Z. F. YOST, and GEORGE TORRANCE, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

This is an appeal from a judgment of the county court of Livingston county confirming the assessment roll of commissioners appointed on the petition of the city of Pontiac to assess special taxes against abutting property for the grading, paving and guttering certain parts of four streets of the city. On the 27th of June, 1895, an ordinance was passed providing for the improvement, and the commissioners appointed to make an estimate of the cost made their report on the 28th of June, which was approved by the city council, and on the 29th of June the petition for confirmation was filed in the county court of Livingston county, and on the same day that court appointed commissioners to make an assessment roll for such special tax. Certain lot owners appeared and filed twenty-six objections, and the county of Livingston appeared and filed twenty-one objections. These objections were filed in August, 1895.

It is objected that the city council arbitrarily divided the proposed improvement into eight sections, for the purpose of imposing more than half the cost of the improvement upon the county, it being claimed there could be in this case no difference in benefits. In the absence of what would appear to be a fraudulent division, we

hold the legislative discretion vested in the city council was properly exercised. Where the improvement of an entire district benefits contiguous property in unequal proportions, the city council may divide the improvement into different sections or districts, so as to secure practical uniformity in the distribution of the tax, and to that end, by the division into sections where a difference exists in the nature, extent and cost of an improvement and in the benefits accruing therefrom, a question for the exercise of a discretion on the part of the city council exists. (*Lightner v. City of Peoria*, 150 Ill. 80.) We cannot assume a division into districts was made with an improper purpose, and cannot interfere with the exercise of a discretion vested in the city council.

Appellants claim the notice by mail required by section 141, article 9, chapter 24, was not given; that that given was wholly insufficient to give jurisdiction of the parties to the court, as it appears by the affidavit of the commissioners that it was addressed to the owner or his agent and deposited in the mail, etc. It appears that appellants, except the county of Livingston, on the 8th day of August, 1895, entered their special appearance and moved to quash the affidavit and report of commissioners filing the assessment roll, which motion was overruled and an order entered requiring all persons desiring to file objections to do so by August 12, 1895. Subsequently, appellants appeared and filed objections to the confirmation of the assessment roll, which were overruled. The appearance when these objections were filed was not limited, and by this action of appellants their appearance was entered, and their objection to the sufficiency of the notice cannot be sustained.

It is objected the ordinance is defective in that it did not give the necessary data on which bids could be made. The ordinance is unusually explicit. It names the streets to be paved, the starting point and distance along the street by feet, the width of the pavement, the depth of

the road-bed, the foundation and manner in which the work is to be done, the material to be used, the height, width and length of curbing, and is sufficiently explicit.

It is further objected that by the terms of the ordinance a power vested in the city council is delegated by it to the engineer, and that this renders the ordinance void. By the ordinance the engineer is given a supervisory power over the improvement, to see that the manner in which the work is done is in conformity to the ordinance, and that the materials used, etc., are as required by the ordinance. This is not in this respect the delegation of a power to change the ordinance in any respect, but to see that it is complied with. It was clearly proper to provide such supervision. (*Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562.) To this extent the ordinance is not invalid, but other provisions to be hereafter discussed do render it invalid.

It is objected that reference is made in the ordinance to plans and specifications on file in the engineer's office which render the ordinance invalid. By the first section of the ordinance it is provided the improvement shall be "as shown by plat or map now on file in the office of the city clerk of said city, which said map or plat is hereby referred to and made a part of this ordinance and in the manner following, that is to say, by excavating, grading, curbing and paving with brick, in accordance with the specifications hereto attached and made part of this ordinance." It is true, under the head of "Inlet and catch-basins," it is stated: "Inlet and catch-basin covers to be furnished and placed in position by the contractor, in accordance with the plans and specifications on file in the engineer's office, at all street corners where he shall be directed to do so by the engineer." But the fact that this section of the specifications refers to the plans and specifications on file in the office of the city engineer does not invalidate the provisions of section 1 which refer to plans and specifications on file in the city clerk's office.

The more serious objection to this latter section is, that it provides that inlet and catch-basin covers shall be placed at all street corners where directed by the engineer. This direction is not aided by the estimate of the committee as to the cost of each, and in this respect the case is unlike *City of Springfield v. Mathus*, 124 Ill. 88, and *Barber v. City of Chicago*, 152 id. 37. By the seventh subdivision of section 7 as to plans and specifications it is declared: "Should the engineer or inspector deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not violate or annul the contract or agreement hereby entered into, but the said engineer or inspector shall determine the value of the work so added or omitted, such value to be added to or deducted from the contract price, as the case may be."

This court passed upon a provision in an ordinance providing for a public improvement similar to the above, in *Lake Shore and Michigan Southern Railway Co. v. City of Chicago*, 144 Ill. 391, where it was said: "The commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that the said commissioner may deem desirable or necessary, and the contractor shall furnish any additional materials or do any additional work required by such changes, at the rate said department shall determine to be just." It is enough to say these provisions are condemned in *Foss v. City of Chicago*, 56 Ill. 354. * * * And it is unnecessary to repeat their reasoning. * * * The judgment is reversed and the cause remanded, with directions to the court below to enter judgment refusing to confirm the assessment." To the same effect is *Rich v. City of Chicago*, 152 Ill. 18.

The provision as to cross-walks is as follows: "Cross-walks shall be of such form as directed by the engineer, and will be laid at such street intersection or other points on the streets to be paved under these specifications, and

in such manner and according to the grades and plans of the engineer." The provisions referred to do confer a power on the engineer not authorized by law, and render the ordinance invalid.

It is urged by appellant the county of Livingston that the ordinance is void because it provides the tax shall be collected in five installments, the first of which shall be twenty-five per cent of the total tax, and the other seventy-five per cent to be divided into four equal installments, which is not in accordance with the act of 1893, (Laws of 1893, p. 78,) which provides the first installment shall include all fractional amounts, etc. This was not presented by a specific objection, but was urged in argument. We held in *Delamater v. City of Chicago*, 158 Ill. 575, the mere failure to include in the first installment all the fractional amounts, leaving the others in multiples of \$100, did not render the assessment void. The court had power to change the assessment in that respect if a specific objection had been made, and the failure to do so was a waiver, and that objection could not for the first time be raised in this court.

It is insisted the ordinance is void because it fixes the time at which the installments shall commence to draw interest at January 1, 1896. The statute of 1893 provides the installments shall begin to draw interest thirty days after confirmation. The judgment of confirmation of this case was on September 6, 1896. Because interest began to run nearly three months later than might have been provided, worked no injury to objectors, and they cannot avail of what does not operate to their prejudice. *Worden v. Crist*, 106 Ill. 326; *Pontiac Nat. Bank v. King*, 110 id. 254; *Farnan v. Borders*, 119 id. 228.

Objection was made that the benefits to the property against which the tax was levied were less than the amount assessed, and a jury was demanded to hear and determine that question. We have in *Illinois Central Railroad Co. v. City of Wenona*, 163 Ill. 288, discussed that ques-

tion, and will not here repeat what is there said. It was not error to overrule the objections not here specifically discussed.

The judgment of the county court is reversed and the cause is remanded.

Reversed and remanded.

JULIUS SCHWABACHER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa April 3, 1897.

165	618
206	*421
206	*428
206	*427

1. CRIMINAL LAW—*the crime of burglary may be committed either in the day time or night.* Under section 36 of the Criminal Code, as amended in 1885, (Laws of 1885, p. 73,) to constitute a crime burglary the time when the crime was committed, whether day or night, is material only in determining the minimum sentence.

2. SAME—*a house does not cease to be a dwelling, though occupants are temporarily absent.* A dwelling house does not cease to be such, within the meaning of section 36 of the Criminal Code, though its occupants are temporarily absent, as in such case the intention to return is the controlling consideration.

3. SAME—*where specific intent is the essence of a crime, intoxication of accused may be shown in defense.* Where, under an indictment, it is necessary to prove a specific intent on the part of the accused in order to establish the crime, it may be shown in defense that the accused was at the time so intoxicated as to be incapable of forming the intent, and an instruction to the contrary is erroneous.

4. PLEADING—*criminal—not a variance to prove burglary in the night time where indictment is silent as to time.* Where an indictment for burglary is silent as to whether the crime was committed in the day time or the night time, it is not a variance to prove that the crime was committed in the night.

5. SAME—*effect as to minimum sentence where indictment fails to allege burglary in night time.* Where an indictment for burglary fails to allege that the offense was committed in the night time, the minimum sentence to be imposed on conviction must be that provided for burglary in the day time.

6. INSTRUCTIONS—*when instruction which invades jury's province will not reverse.* Where an indictment charges burglary in the night in

one count and is silent as to time in another, an instruction as to the form of the verdict which fixes the minimum sentence at five years will not reverse, where the fact that the offense was committed in the night is not controverted.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

I. C. EDWARDS, G. B. FOSTER, and J. A. WEIL, for plaintiff in error:

Bouvier thus defines a dwelling house: "A building inhabited by man; a house usually occupied by the person there residing and his family." Bonner's Law Dictionary: "The apartment, building or cluster of buildings in which a man, with his family, resides."

What was once a dwelling house may cease to be such, though no change is made. 1 Bishop on Crim. Law, secs. 295, 296; *Hooker v. Commonwealth*, 13 Gratt. 763; *State v. Clark*, 7 Jones, (N. C.) 167.

A building is not a dwelling house, though finished and furnished for abode and used for taking meals and other purposes, unless the person occupying it, or some one of his family or servants, sleeps in it. 1 Bishop on Crim. Law, sec. 296.

The sleeping in a house at night fixes its character whether or not it is a dwelling house, for a house which is only occupied and resided in during the day is not considered a dwelling house. *United States v. Johnson*, 2 Cranch, 21.

M. T. MOLONEY, Attorney General, (T. J. SCOFIELD, M. L. NEWELL, and SAMUEL RICHOLSON, of counsel,) RICHARD J. COONEY, State's Attorney, and FRANK J. QUINN, Assistant State's Attorney, for the People:

It is not necessary that any person should in fact actually be in the house at the time a burglary is committed, to constitute it a dwelling house; nor does a temporary absence of the occupants, even though for the

time being they may have established another dwelling house, destroy the character of a building to the degree that it ceases, from this fact, to be a dwelling house. 2 Wharton on Crim. Law, 819; 3 Greenleaf on Evidence, sec. 79; 2 Am. & Eng. Ency. of Law, 672.

The house in which a man has his true, fixed home, and to which, whenever he is absent, he has an intention of returning, is his dwelling house. 10 Mass. 183; 11 La. 175; 5 Metc. (Ky.) 187; 4 Barb. 505; 1 Bosw. 673.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error was convicted of the crime of burglary at the February term, 1895, of the Peoria circuit court, and sentenced to imprisonment in the penitentiary for the term of five years. He brings this record here for a review on writ of error.

Plaintiff in error was an unmarried man of about the age of thirty-two years, the son of respectable parents, with whom he lived in Peoria. Shortly after midnight of the 8th of May, 1894, he was discovered in the dwelling house of Mrs. Bell, located almost directly across the street from his parents' home. Mrs. Bell was not at home, and no one was in the house when it was broken open. He had entered the house by breaking through one of the windows and had gone up stairs, lighted the gas, and broken into a dresser in one of the rooms and taken out a lot of silverware and other valuables which had been placed there by Mrs. Bell, and laid them in a pile upon the bed. He was discovered by a member of a family living in the adjoining house, who telephoned to the police. When the officers came they fired pistols on the outside, which seems to have alarmed him and he started to leave the house, when he was arrested. It seems that the curtains were up and there was nothing to obscure the view of outsiders of what was going on in the house when the gas was lighted by plaintiff in error. Occupants of the adjoining house had been aroused by a

noise as of the crashing of glass. Plaintiff in error seems, from the evidence, to have arisen from his bed at home a few minutes after retiring, and, with his night shirt still on, to have dressed himself in trousers and dress coat, Derby hat and patent leather shoes, without socks or underwear. He was apparently indifferent to his surroundings and to his arrest. He had for many years been addicted to the excessive use of intoxicating liquors, and had lived a life of reckless debauchery. He had, shortly after eleven o'clock of the same night, separated from a number of his companions who had made the rounds with him, visiting a number of saloons and other places, drinking to excess, and it was only a few minutes after he had been persuaded to retire for the night at his home, and had undressed and gone to bed, that he was found in Mrs. Bell's house, as before stated.

There was little or no dispute as to the principal facts of the occurrence, but it was contended by his counsel that defendant was of unsound mind and incapable of forming an intent to commit the alleged crime, and was not criminally responsible. Soon after the occurrence he was pronounced insane by several physicians and sent to Oak Lawn, a retreat for the insane at Jacksonville, where he remained for some time and until his trial. It was a controverted question on the trial whether or not he was of sound mind and mentally capable of distinguishing between right and wrong. Various physicians and experts upon mental diseases were examined, but the jury found that he was not insane, and returned their verdict that he was guilty of burglary as charged in the indictment, and fixed his punishment at five years in the penitentiary.

The indictment contained four counts. The first two, in substantially the same language, charged in appropriate words that the defendant broke and entered the dwelling house of Mrs. Frankie Bell in the *night time*, with intent to steal, etc. The other two counts charged

in appropriate language that he broke and entered the same dwelling house with intent to steal, etc., but they contained no allegation as to the time when the offense was committed,—whether at day or night.

The court instructed the jury, at the request of the People, among other things, as follows:

“If you find the defendant guilty of burglary as charged in the indictment, you shall also find his age, and if he is over twenty-one years of age your verdict may be as follows:

“We, the jury, find the defendant, Julius Schwabacher, guilty of burglary as charged in the indictment, his age to be..... years, and fix his punishment at..... years in the penitentiary.

..... *Foreman.*

—“Writing in his age as near as you can, and fix his term of imprisonment in the penitentiary at not less than five years nor more than twenty years.”

Counsel for plaintiff in error insist that the court erred in giving this instruction to the jury. It is said that, as plaintiff in error was on trial on all four of the counts of the indictment, the jury would have been authorized to find him guilty under the last two counts or under any count of the indictment, and to fix his punishment as prescribed by the statute,—that is, they would have been authorized to find him guilty of burglary as charged in the third and fourth counts, and to fix his punishment at any term of years not less than *one* nor more than twenty years in the penitentiary,—but that the instruction in question invaded the province of the jury, and arbitrarily directed them, if they found him guilty as charged in the indictment, to fix his punishment at not less than five years.

At common law burglary could be committed only in the night time, and it was necessary to allege in the indictment that the breaking and entering was in the night time. But the law in this respect has been materially changed by our statute. Section 36 of the Criminal Code

is as follows: "Whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force, (the doors or windows being open,) enters into any dwelling house, kitchen, office, shop, storehouse, warehouse, malthouse, stillinghouse, mill, pottery, factory, wharfboat, steamboat or other water craft, freight or passenger railroad car, church, meeting house, school house or other building, with intent to commit murder, robbery, rape, mayhem or other felony, or larceny, shall be deemed guilty of burglary, and be imprisoned in the penitentiary for a term not less than one year nor more than twenty years: *Provided, however,* that whoever willfully and maliciously and forcibly breaks and enters, or willfully and maliciously, without force, (the doors or windows being open,) enters into any dwelling house in the night time, with intent to commit murder, robbery, rape, mayhem or other felony, or larceny, shall, on conviction, be imprisoned in the penitentiary for a term of not less than five years nor more than twenty years: *Provided, further,* that if, at the time of committing the offense mentioned in the proviso, such person shall be found with any deadly weapon, deadly drug or anæsthetic upon his person or in his possession; he shall, on conviction, be punished by imprisonment in the penitentiary for any term of years not less than five." (Laws of 1885, p. 73.)

It would seem clear from this provision of the statute that to constitute the crime of burglary generally, the time of its commission, whether day or night, is immaterial, and that it becomes material only under the proviso to the section to determine whether the crime has been committed under the aggravated circumstances therein mentioned, so that the minimum of punishment, instead of being one year, shall not be less than five years. The crime of burglary is defined and the punishment provided by the first part of the section, and the proviso thereto merely provides for increased punishment when it is

committed in the aggravated form therein mentioned. It would therefore seem clear that under a count framed under the first part of the section for burglary generally, without specifying whether committed at day or night, as the last two counts in this indictment were framed, the accused might be found guilty, where the evidence was otherwise sufficient, even though it appeared the offense was committed in the night time. But in such a case the punishment would be from one to twenty years, at the discretion of the jury, and not from five to twenty years. This question was practically so decided in *Bromley v. People*, 150 Ill. 297, where it was said, among other things (p. 302): "Applying to the case of a burglary not alleged in the indictment to have been committed in the night time, the rule above quoted from Bishop, (1 Bishop on Crim. Proc. sec. 84,) and that which seems to be the doctrine of *Harris v. People*, *supra*, (44 Mich. 305,) *Summers v. State*, *supra*, (9 Tex. App. 396,) and *Bravo v. State*, *supra*, (20 Tex. App. 188,) it would seem that only the punishment provided for burglary in the least aggravated degree can be imposed." It would be burglary in either case, whether committed at night or in day time, and it cannot be correctly said that because the proof establishes the offense in its aggravated form it does not establish it in its less aggravated form. Where sufficient is proved to establish the offense, it would be altogether illogical to say there was a failure of proof, or a variance between the allegations and proof, simply because more was proved than alleged.

It follows, therefore, that the evidence, if otherwise sufficient, would have authorized the jury to find the accused guilty under either of the last two counts of the indictment, and had they done so, the minimum punishment as provided by the statute would have been one year instead of five years. It further follows, that by the instruction in question the court in effect withdrew from the jury the discretion vested in them of applying

the evidence to the last two counts of the indictment, and directed them to apply it to the first two, where the minimum punishment would be greater. It cannot be doubted that, as a general rule, it would be error to do this, for it is not a case where the evidence was not applicable to the counts in question, but one where the evidence was applicable to each and all the counts, and the court directs its application to those requiring the greater punishment. It is, however, certainly true that under the special facts of this case the evidence was more directly applicable to the first two counts, for it fitted the allegation that the burglary was committed in the night time, and there was no pretense that the occurrence did not take place in the night time. Had there been any question of fact as to whether it was in the day or night time, it is very clear that serious and harmful error would have been committed by the giving of the instruction. But there was none, and while it was within the province of the jury to render a verdict under the last two counts, they could not have done so without undue sensibility manifested in favor of the accused in refusing to give to the fact proved, that the offense was committed in the night time, the effect prescribed by the statute. While, therefore, we regard the instruction as technically incorrect as an invasion of the province of the jury, and one which in many cases would lead to harmful results, still it appears to be clear that the just legal rights of the accused were not in this case injuriously affected by it, for, if guilty of burglary at all, he was guilty of burglary under the aggravated circumstance of having committed it in the night time, as mentioned in the proviso to the above section of the statute. Our conclusion therefore is, that no harmful error was committed in this respect so as to justify a reversal on that ground.

The question chiefly contested by counsel is, was the building burglarized a "dwelling house," within the meaning of that term when used in defining the crime of bur-

glary? It is used in our statute in the same sense it was at common law and must be given the same meaning. Each count of the indictment charges that the defendant "did break and enter the dwelling house of Mrs. Frankie Bell." The allegation that the building was a dwelling house was a material one, and no conviction could be sustained without proof that the building was a dwelling house. The building was erected for a residence. Mrs. Bell owned it, and had furnished and occupied it as her home for about two years prior to the burglary, except that on the 10th of July, 1893, as she stated in her testimony, she "left the house as any one would in leaving a house to be gone some time." She testified also that she sent her papers, and some of her more valuable silverware, to a bank in the city for safe keeping; that many of her household effects were put in packing boxes, trunks and large drawers of dressers. When she left she seems to have gone to Chicago, and remained away until the 14th of February, following, when she returned and only remained in the house for a day. Speaking of the condition of things there at that time she says: "Everything of value had been put away and a great many of my possessions were packed in packing boxes." As a reason for leaving the window curtains rolled up she stated, "I wanted to come home and find that my curtains were not full of dust." The carpets were left upon the floors and the beds undisturbed. The gas was left turned on, ready for immediate use. She left a man in charge of the barn and grounds, but no one in or to look after the house.

It is well settled that to constitute a building a dwelling house it is not necessary that any person should be actually in the house at the time a burglary is committed. Nor will a dwelling house cease to be such because of the temporary absence of its occupants, even though another dwelling place may be established for the time being. In all such cases the intention to return is the controlling consideration. Thus it is said in Green-

leaf on Evidence, (vol. 3, sec. 79): "It is not necessary, however, that the inhabitants be within the house at the moment, for burglary may be committed while all the family are absent for a night or more, if it be *animo revertendi*." Wharton, in his work on Criminal Law, (vol. 2, p. 319, sec. 1573,) after stating the rule as above, says: "Burglary may be committed in a house in the city in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in the house in which the crime is charged to have been committed, but merely visited it occasionally." In a note on page 672 of 2 Am. & Eng. Ency. of Law it is said: "A house is no less a dwelling house because at certain periods the occupier quits it, or quits it for a temporary purpose. 'If A has a dwelling house, and he and all his family are absent a night or more, and in their absence, in the night, a thief breaks and enters the house to commit felony, this is burglary,' (citing authorities.) So if A have two mansion houses, and is sometimes with his family in one and sometimes in the other, the breach of one of them in the absence of his family is burglary. * * * The prosecutor, being possessed of a house in Westminster, in which he dwelt, took a journey into Cornwall with intent to return, and moved his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open and robbed. He returned a month after, with his family, and inhabited there. This was adjudged burglary. In these cases the owner must have quitted his house *animo revertendi* in order to have it still considered as his mansion, if neither he nor any part of his family were in at the time of the breaking and entering. 2 East's P. C. 496."

While the testimony of Mrs. Bell was not explicit as to her intention to return, and in some parts of it tended to show indecision on that question, we think that, taking it altogether, the jury were authorized to find that she did intend to return, and that it was therefore her dwelling house. As a matter of fact she did return and occupy it as her home. It was not shown that she established a home anywhere else, and she did not disfigure the house and remove her goods without any settled resolution to return, but rather inclining to the contrary, as in 2 East's P. C. 496. The court in that case laid stress upon two important facts wanting in this evidence,—that is to say, the removal of the goods "*without any settled resolution to return, but rather inclining to the contrary.*" There the prosecutor also moved to another dwelling house owned by him, whereas Mrs. Bell is not shown to have established herself and family in any other house, or even contemplated doing so. While the evidence on this branch of the case is not as clear as perhaps it might have been made had more attention been paid to it on the trial, still we cannot say it is not sufficient to support the verdict.

It is next contended that the medical expert testimony and other evidence tending to show defendant's mental unsoundness were sufficient to raise a reasonable doubt of his sanity, and that the verdict and judgment are erroneous for that reason. It is argued that the evidence shows that his parents had abundant means; that he resided with them and that his every want was supplied by them; that he had no motive for the commission of the crime; that he had no use for the articles he gathered together while in Mrs. Bell's house; that he took no precautions to prevent detection; that the house he entered was that of a near neighbor; that he made no effort to escape; that he was intoxicated and had for many years been an habitual drunkard, and had for many years suffered from a loathsome disease which affected

his mind; that he was both a physical and mental wreck, incapable of distinguishing right from wrong or of being conscious of the moral quality of any act he might perform, and that the occurrence originated in a crazy freak caused by his drunken and demented condition. It can not be denied that there was evidence tending to prove this contention, and several experts in mental diseases testified that he was insane and not responsible for his acts. But there was also much evidence to the contrary, tending to show that he was sane and responsible. It was a question pre-eminently for the jury. At the same time the conflict in the evidence was such as to make it of the greatest importance that the instructions given to the jury should be accurate statements of the law, and as the judgment must be reversed for another reason we deem it inadvisable to comment to any extent upon the evidence.

At the instance of the People the court gave to the jury the following instruction:

"You are further instructed that drunkenness is no excuse for the commission of any crime or misdemeanor, unless such drunkenness was occasioned by fraud, contrivance or force of some other person, for the purpose of causing a perpetration of an offense. And where the act of a defendant would be criminal if committed when he was sober, the fact that he committed such act while intoxicated will constitute no defense, unless his intoxication was caused by some other person for the purpose above stated,—and this is the rule even where such intoxication is so extreme as to make such defendant unconscious of what he was doing."

It is undoubtedly true that at common law drunkenness was no excuse for crime; nor is it under the statute, except as therein provided. But where, as under the indictment in this case, it is necessary to prove a specific intent before a conviction can be had, it is competent to prove that the accused was at the time wholly incapable

of forming such intent, whether from intoxication or otherwise. The breaking and entering the house in the night time alone did not constitute the crime of burglary, but it was necessary to prove that the act was done with the specific intent alleged in the indictment,—that is, to steal the goods and chattels therein of Mrs. Bell. In *Bartholomew v. People*, 104 Ill. 601, in delivering the opinion of the court, Mr. Justice SCHOLFIELD said (p. 606): “At common law, where it required a particular intent in the doing of an act to constitute crime,—as, for instance, larceny, where the intent to steal must accompany the act of taking,—it is held it may be shown in defense that the party charged was intoxicated to that degree that he was incapable of entertaining the intent to steal, and that he neither then, nor afterwards, yielded it the sanction of his will. (1 Bishop on Crim. Law, (3d ed.) sec. 490; *United States v. Routenbush*, 1 Baldw. 517; *Swan v. State*, 4 Humph. 136; *Pigman v. State*, 4 Ohio, 555; *Kessy v. State*, 3 Sm. & M. 518. See, also, 1 Wharton on Crim. Law,—7th ed.—sec. 41.) It was therefore competent to make the defense relied upon.”

The precise instruction here being reviewed was condemned by this court in *Crosby v. People*, 137 Ill. 325, in an indictment for an assault with intent to murder, and the judgment was reversed solely for the error in giving the instruction. After reviewing the authorities Mr. Justice SHOPE, in delivering the opinion, said (p. 343): “Drunkenness was, therefore, at common law as under our own statute, no excuse for crime, but where the nature and essence of the offense is, by law, made to depend upon the state and condition of the mind of the accused at the time, and with reference to the acts done and committed, drunkenness, as a fact affecting the control of the mind, is proper for the consideration of the jury, for if the act must be committed with a specific intent to constitute the crime charged, and the defendant is incapable of forming any intent whatever, the offense has not been

committed." It was there further said that the statute has not changed the common law, and that "the question of intent and of the existence of the particular intent was one of fact to be determined by the jury, and the defendant had, under the indictment, the right to have that matter submitted to and passed upon by the jury." This case must be governed by the same rule.

It follows the court erred in giving to the jury the above instruction, and for that error the judgment must be reversed and the cause remanded.

Reversed and remanded.

F. M. ROBERTS, Admr.

v.

EFFIE TUNNELL.

Filed at Springfield April 3, 1897.

1. LIMITATIONS—*operation of section 19 of the Limitation act, as to right of action against personal representatives.* By section 19 of the Limitation act, (Rev. Stat. 1874, p. 676,) if one against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be brought against his personal representative after the expiration of that time but within one year after such representative is appointed.

2. PARTIES—*administrator not a necessary party to foreclosure suit.* An administrator is not a necessary party to a bill to foreclose his intestate's mortgage, where the bill seeks a foreclosure only, and not to charge him or the personal estate in his hands.

Roberts v. Tunnell, 65 Ill. App. 191, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Greene county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

MARK MEYERSTEIN, for appellant.

165	631
179	333

HENRY T. RAINEY, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On February 4, 1878, George B. Allen gave to appellee his note for \$700, payable two years from its date, with interest at ten per cent, and on November 18, 1878, he executed his mortgage deed to secure its payment. He died June 5, 1887, and letters of administration on his estate were issued to appellant August 23, 1894. Appellee commenced this suit for the foreclosure of the mortgage January 11, 1895. Appellant was not made a defendant to the bill when filed, but on March 5, 1895, he was admitted as a defendant upon his own motion. Exceptions were sustained to his amended answer setting up the Statute of Limitations as a defense. He stood by the answer, and there was a decree for \$1894.33 and costs and for a foreclosure and sale. The Appellate Court affirmed the decree.

The answer averred that there was no personal estate of the deceased mortgagor, and no real estate except that described in the mortgage; that said real estate was not worth as much as the amount of the mortgage; that claims had been allowed by the county court against the estate to the amount of \$1602.75, and that there was no other source than the real estate out of which any part of them could be satisfied.

One ground of exception to this answer was, that an administrator cannot plead the Statute of Limitations in defense of a foreclosure proceeding, and counsel have argued the question whether he is in such privity, in representation or right, with his intestate, as to enable him to do so; but this question will not be considered, because we think that the mortgage was not barred by the statute. The note became due February 7, 1880, and but for the death of the maker the time limited for bringing an action would have expired February 7, 1890. George B. Allen

died June 5, 1887,—before the expiration of that time. The cause of action on the note survived, and suit might be brought against his administrator whenever he should be appointed. None was appointed until August 23, 1894, and the bill was filed to foreclose the mortgage in less than one year from such appointment. These facts bring the note within the provision of section 19 of the act in regard to limitations, in force July 1, 1872, as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." By this section, where a cause of action survives and is not barred at the death of the debtor, the creditor is allowed one year after letters of administration are issued in which to bring such action. At the time this bill was filed an action at law might have been brought against appellant upon the note, or it could have been proved against the estate in the county court, and in neither case could he have pleaded the Statute of Limitations with success. The mortgage was but an incident of the debt which it was given to secure, and the period of limitation would not expire until the debt was barred. *McMillan v. McCormick*, 117 Ill. 79; *Schifferstein v. Allison*, 123 id. 662.

Appellant was not a necessary party to the bill, which sought nothing but a foreclosure, and did not seek to charge him or the personal estate in his hands. (Story's Eq. Pl. sec. 196.) We do not see that this fact affected the rule in any way. As long as the debt was alive and an action could be maintained at law on the note, appellee could foreclose the mortgage and enforce her security.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

v.

OLIVER WINGLER, Admr.

Filed at Springfield April 3, 1897.

1. JUDGMENTS AND DECREES—*when courts may enter judgment at a subsequent term.* Courts have no power to enter a judgment *nunc pro tunc* as of a previous term, unless a judgment was in fact rendered at the previous term which was not entered of record through some fault, neglect or oversight.

2. SAME—*fact that judgment was pronounced at former term must appear of record.* The fact that a judgment was pronounced at a previous term but not entered must appear by some minute or memorial paper in the record itself, and cannot be proved by the memory of witnesses or the personal recollection of the judge.

3. PRACTICE—*proper order on appeal from judgment erroneously entered.* Where all proceedings in a trial up to the entry of judgment are regular, but the judgment is erroneously entered at a subsequent term *nunc pro tunc*, upon reversal, on appeal, on that ground, leave will be given to appellee to move for the entry of a proper judgment on the verdict.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Fulton county; the Hon. JEFFERSON ORR, Judge, presiding.

JNO. A. GRAY, and WALKER & LANDAUER, for appellant.

G. L. MILLER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Third District, affirming a judgment of the circuit court of Fulton county in favor of appellee, against appellant. The trial took place at the December term, 1895, when a verdict was returned in favor of appellee, who was plaintiff in the suit. A motion for a new trial was made by defendant and overruled, and to this ruling

the defendant excepted. A motion in arrest of judgment was then interposed, and upon said motion being overruled by the court, defendant prayed an appeal to the Appellate Court, which was allowed on filing a bond within seventy days. No judgment was entered at that term and the case went off from the docket. At the succeeding March term, 1896, plaintiff entered his motion to re-docket the case, and to have judgment upon the verdict of the jury entered *nunc pro tunc* as of said December term, 1895. The motion was allowed, the cause re-docketed, judgment entered *nunc pro tunc*, and time for filing an appeal bond was extended to April 10, 1896.

It is well settled that a court has no right to enter a judgment *nunc pro tunc* at a subsequent term unless the judgment was in fact rendered at the previous term, and was not entered of record through some fault, neglect or oversight; and in such case the fact that the court did give judgment at the previous term can only be proved by some memorial paper or minute in the case made at such former term. The judgments and records of courts cannot rest in parol or upon so uncertain a foundation as the personal recollection of the judge or any other person, and the fact that a judgment was rendered at a former term cannot be determined from the memory of witnesses or the personal recollection of the judge himself. Where there is no minute or memorial paper in the records of the court to show that judgment was in fact pronounced it cannot be so entered. (*Coughran v. Gutcheus*, 18 Ill. 390; *Dougherty v. People*, 118 id. 160; *Ayer v. City of Chicago*, 149 id. 262; *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 150 id. 607; *Tynan v. Weinhard*, 153 id. 598.) What is meant by a memorial paper or minute is fully explained in *Dougherty v. People*, *supra*, and *Tynan v. Weinhard*, *supra*. It must be made and preserved as a part of the records of the court pursuant to law.

The order for the entry of the judgment at the subsequent term recited as follows: "And the court having

heard the evidence in open court and upon personal recollection of the presiding judge of said court, it is ordered by the court that the clerk of this court enter the judgment of the court as rendered upon the verdict of the jury at the December term, 1895, of this court, *nunc pro tunc*." If the bill of exceptions did not show an entire want of evidence aside from the personal recollection of the judge, the entry of the judgment might be sustained by virtue of the presumption that the court heard competent evidence which sustained the order. This was done in *Howell v. Morlan*, 78 Ill. 162, and *Gebbie v. Mooney*, 121 id. 255. But in this case the defendant at the time tendered its bill of exceptions, which was signed and sealed by the judge, showing that there was no evidence before the court on the hearing of the motion, and that the motion was granted entirely upon the personal recollection of the judge that he gave judgment at the previous term, and there is nothing in the record which in any manner aids or tends to justify the action of the court. The original bill of exceptions taken at the December term does not recite a judgment or exception thereto. So far as appears from the entire record of that term the appeal was prayed from the order overruling the motion for a new trial. The appeal bond provided for at that term had not been filed prior to the order in question, so that there was no showing that the proposed appeal was from any judgment. There is no escape from the conclusion that the court was without power to enter the judgment *nunc pro tunc* as of the previous term. The rule forbidding such a practice is too well settled to admit of question, and must have the approval of all persons interested in judicial records.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court with leave to appellee to move for the entry of a proper judgment on the verdict.

Reversed and remanded.

ANNA M. ELLIS

v.

MAGGIE DICK, EXRX.

Filed at Springfield April 3, 1897.

WILLS—*construction of will and codicil as to distribution of estate.* Where a will provides that certain property be divided equally among the testator's three children when the youngest attains majority, a codicil providing that a certain sum be paid to the two older children when they marry or reach a certain age will be construed merely as determining an amount to be paid and as accelerating the time of payment, and not as changing the testator's intention to make an equal division among the three.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. OSCAR P. BONNEY, Judge, presiding.

By the last will and testament of Jacob Dick he devised one-third of all his property, real and personal, after the payment of debts and funeral expenses, to his wife. By the third clause of his will all property not devised to his wife was directed to be used by his executrix or administrator, the principal or income thereof as should be necessary for the maintenance and support of his three children, Anna, Katie and August, until the youngest one should have attained the age of twenty-one years, and at that time whatever might remain of his property should be equally divided amongst his children, without regard to what may have been expended for their support and education, respectively. After the execution of this will a codicil was attached thereto, duly executed, by which it was recited that he had provided that his children should not receive the property bequeathed to them until the youngest of them, or the survivor of them, should have attained the age of twenty-one years, and he then declared that by that codicil his

will was, that after his daughters, "or either of them, shall have arrived at the age of twenty-one years and shall then marry, or if they shall have married before that time, they shall in that event receive the sum of \$3000 each," to be paid by the executrix as soon as they should attain the age of twenty-one years or marry.

At the time of the death of the testator, on December 22, 1876, his wife and three children survived him. Of the children, Anna was aged thirteen, Katie ten and August five years. November 5, 1887, Anna was married, on April 10, 1888, Katie was married, and on October 14, 1892, August became of age. When the daughters were married they were over twenty-one years of age, respectively, and were each paid the sum of \$3000, as provided by the codicil, and when August attained his majority he received from the executrix a similar amount. The executrix, Maggie Dick, made her report to the county court of Adams county in October, 1895, by which she asked credit *inter alia* for the \$3000 paid to August Dick on October 4, 1892. To that report Anna filed exceptions. The county court held the payment of \$3000 to August Dick was improper and unauthorized, and the account required to be re-stated. On appeal to the circuit court of Adams county the order of the county court as to the \$3000 paid August Dick was reversed, and it was held that on that item the report was to be approved and the executrix was entitled to the credit of \$3000. Exception was entered by Anna, and on appeal to the Appellate Court for the Third District the judgment of the circuit court was affirmed.

WILLIAM McFADON, for appellant:

A later clause in a will repugnant to a former one modifies the former. *Jenks v. Jackson*, 127 Ill. 341; *Siddons v. Cockrell*, 131 id. 653.

A codicil will be treated as an amendment of the former will, and to the extent of the changes thereby pro-

vided for it is a cancellation of the provisions of the will. 2 Williams on Executors, 1081; 1 id. 8, 162.

The intention of the testator, as manifested by the words used, must govern. *Banta v. Boyd*, 118 Ill. 186.

GOVERT & PAPE, for appellee:

Where a will contains a clear and unambiguous disposition of property, real or personal, such gift will not be revoked by doubtful expressions in a codicil. 1 Jarman on Wills, 348; 3 Am. & Eng. Ency. of Law, 296.

It may be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words, unless they show a clear intention. 29 Am. & Eng. Ency. of Law, 299.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

A codicil, when probated and proven, is a part of the will. It may, of itself, be a will. (*Fry v. Morrison*, 159 Ill. 244, and authorities cited.) The purpose of the testator, when ascertained, must control in the construction of wills. From this will it is apparent that at the time of its execution the testator intended that his estate, except that part devised to his wife and the income of the residue necessary to be used for the support and education of his children, should be distributed equally among his children when the youngest should become twenty-one years of age. By the codicil it was provided that the daughters, after marriage and arriving at twenty-one years of age, they being the oldest, should each receive the sum of \$3000. By this codicil the sum to be paid is determined and the time of payment accelerated. It did not give the daughters each \$3000 and distribute the remainder. The payment to August was a proper credit.

The judgment of the Appellate Court for the Third District is affirmed.

Judgment affirmed.

TIMOTHY DONAHUE,

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

Filed at Springfield April 3, 1897.

1. **LIMITATIONS**—*bar of twenty years' statute applied to right of way.* Twenty years' uninterrupted, open, adverse and exclusive possession of a portion of a railroad company's right of way by a party claiming to own the same bars the rights of the company therein.

2. **SAME**—*title acquired by twenty years' limitation available for purposes of attack.* Whenever the bar of the twenty years' statute of limitations becomes absolute, and the party entitled is in possession under it, it is thereafter as available for purposes of attack as of defense, whether the occupant continues in the actual possession or not.

3. **SAME**—*when defense of seven years' statute cannot be sustained.* The defense of the seven years' statute to ejectment against a railroad company cannot be sustained, in the absence of evidence in the record to show that the company had ever listed the land with the Auditor, as required by its charter, or that the Auditor had ever assessed any taxes against the land, or against the railroad company, as owner.

4. **TAXES**—*when right of way, originally exempt, becomes taxable property.* Land originally part of a railroad company's right of way, and as such exempt from taxation except as provided by the company's charter, which ceases to be the company's property through the bar of the twenty years' statute, is thereafter liable to assessment and taxation as other private property.

WRIT OF ERROR to the Circuit Court of McLean county;
the Hon. THOMAS F. TIPTON, Judge, presiding.

THOMPSON & DONAHUE, for plaintiff in error:

The plaintiff acquired title to this land by the adverse use of it for twenty years. *Railroad Co. v. Houghton*, 126 Ill. 233; *Railroad Co. v. O'Connor*, 154 id. 550; *Railroad Co. v. Moore*, 160 id. 9.

The charter of the company is a contract with the State, and is construed the same as any other contract. The payment of seven per cent of its gross earnings is not the payment of a tax in compliance with either the

sixth or seventh sections of the Statute of Limitations, but the payment of a debt created by the contract of the company with the State, and nothing short of twenty years will give the company title. *Railroad Co. v. Irwin*, 72 Ill. 452; *Railroad Co. v. People*, 95 id. 313; *Vincennes v. Gas Light Co.* 132 Ind. 114; Cooley on Taxation, (2d ed.) 1, 4, 17; *Telegraph Co. v. Myers*, 28 Ohio St. 521; Anderson's Law Dic. 1006; *Merriweather v. Garnett*, 102 U. S. 513; *Lane Co. v. Oregon*, 7 Wall. 80; *Price v. Boston*, 3 Metc. 520; *Perry v. Washburn*, 20 Cal. 318; *Webster v. Seymour*, 8 Vt. 135; *Johnson v. Harwood*, 41 id. 122; *Finnegan v. Fernandina*, 15 Fla. 379; *Edmunson v. Galveston*, 53 Tex. 157.

If this land is exempt from general taxation the seven years' statute of limitations has no application. *Wisner v. Chamberlin*, 117 Ill. 568.

Twenty years' adverse possession of land which is burdened with an easement will extinguish the easement. *Johnson v. Peoria*, 56 Ill. 45; *Winnetka v. Prouty*, 107 id. 225; 2 Wood on Railways, sec. 240; *Norton v. Railway Co.* L. R. 13 Ch. Div. 268; Washburn on Easements, 654-657; *Steere v. Tiffany*, 13 R. I. 568; *Benly v. Root*, 32 Atl. Rep. 918; *State v. Culver*, 55 Mo. 607; *Coleman v. Railroad Co.* 64 Mich. 163; *Simplot v. Dubuque*, 49 Iowa, 630; *Bardslee v. French*, 7 Conn. 125; *Holt v. Sargent*, 15 Gray, 97; *Amsby v. Hinds*, 46 Barb. 623; 3 Kent's Com. (11th ed.) 448; *Corning v. Gould*, 16 Wend. 531; *Wright v. Freeman*, 5 H. & J. 477; *Emerson v. Wiley*, 10 Pick. 310; *Yeakle v. Nace*, 2 Whart. 123; *Smith v. Langewald*, 140 Mass. 205.

WILLIAMS & CAPEN, for defendant in error:

The Limitation act does not transfer the title to the land. This can only be done in a judicial proceeding. The act under such an interpretation would be unconstitutional. *Harding v. Butts*, 18 Ill. 502; *Newland v. Marsh*, 19 id. 376; *Hinchman v. Whetstone*, 23 id. 185; *Gage v. Smith*, 142 id. 191; *Cook v. South Park Comrs.* 61 id. 115.

Statutes of limitation work only upon the basis of a possession. See cases above cited.

It is not necessary that the payment of the taxes for the seven years should be the years immediately following the date of acquiring the title. Any subsequent continuous seven years' payment, joined with the other requisites, satisfies all requirements. *Starr & Curtis'* Stat. chap. 83, sec. 6; *Newland v. Marsh*, 19 Ill. 376; *Dunlap v. Daugherty*, 20 id. 397; *Hinchman v. Whetstone*, 23 id. 185; *McConnel v. Street*, 17 id. 253.

A plaintiff cannot avail himself of the twenty years' statute of limitations after he has lost possession. The only effect of a statute of limitations is as an armor of defense. *McDuffee v. Sinnott*, 119 Ill. 449; see cases *supra*.

Color of title, within the meaning of section 6, chapter 83, of our statute, may be given without any deed or other writing. It may begin in trespass. *McClellan v. Kellogg*, 17 Ill. 498; *Lancey v. Brock*, 110 id. 609.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is a writ of error to the circuit court of McLean county, brought to reverse a judgment for the defendant in an action of ejectment. The suit was brought by plaintiff in error to recover the east fifty feet of lot 44 and the east fifty feet of lot 42, on the west side of the railroad of defendant in error, and the west fifty feet of lot 37 on the east side of said railroad, all in section 10, township 23, north, in McLean county. Defendant in error was in possession claiming the land as a part of its right of way.

It was agreed that in 1853 these strips were a part of a larger tract, and belonged to three persons by the name of Hodge, and that that year defendant in error, by proper proceedings in the McLean circuit court, condemned for its right of way a strip through said larger tract, of the width of two hundred feet, and made payment therefor, of which strip the pieces in controversy were a part.

Soon after, the precise year not being shown, defendant fenced its track, by erecting fences on each side thereof fifty feet from the center line. These fences were maintained there, on the east side until the fall of 1882 and on the west side until the fall of 1885. The Hodges retained possession of the remaining strips of fifty feet, (the property in dispute,) and conveyed them with other lands, and they passed by *mesne* conveyances to plaintiff, the successive grantees from the Hodges taking and maintaining possession thereof and using and cultivating these strips as parts of the larger tracts to which they were attached, up to the railroad fences. This possession was continued by the Hodges and subsequent grantees for nearly thirty years upon the one side, until 1882, and upwards of thirty years on the other, until 1885, when the defendant moved its fences fifty feet further out and took in the strips as a part of its right of way, as before stated. In 1878, long after the twenty years' statute of limitations had run against defendant in error, the Hodge tract was subdivided into lots as an addition to the city of Bloomington, and a survey and plat of the same were made by the county surveyor, which were recorded in 1881. This plat showed the right of way of the defendant through the tract to be one hundred instead of two hundred feet wide. Lots 37, 42 and 44, of which the strips in controversy appear to form a part, were created and designated by this plat. The map or plat of record with the condemnation proceedings, however, showed the right of way was two hundred feet wide.

While there is evidence tending to show that the defendant company, in 1870 or 1872, put in short posts, painted white, at certain road or street corners on the outer lines of the right of way of two hundred feet in width as condemned, still, from the evidence and agreed facts, it is clear that plaintiff and his grantors had been in the open, exclusive and adverse possession of the property, claiming to own it, for more than twenty years,

when defendant moved out its fences and took possession of the land in 1882 and 1885, and that at that time its rights therein were barred by limitation. In this respect the case does not materially differ from *Illinois Central Railroad Co. v. Houghton*, 126 Ill. 233, *Illinois Central Railroad Co. v. O'Connor*, 154 id. 550, and *Illinois Central Railroad Co. v. Moore*, 160 id. 9.

It is, however, contended by defendant, that at the time of the commencement of the suit it had been in possession, under claim and color of title made in good faith, for more than seven successive years, and had during all that time paid all taxes legally assessed on said lands, and was therefore entitled, under the statute, to be adjudged the legal owner,—and this defense seems to have been sustained by the circuit court. Plaintiff does not dispute that defendant took actual possession of the lands, respectively, in the fall of 1882 and of 1885, and continued in such possession until this suit was brought by him in the fall of 1895, but he contends, first, that defendant did not have such possession under claim and color of title made in good faith; and second, that it did not, during such possession, pay all taxes legally assessed upon the premises for seven successive years. The strips in question were assessed for taxes as parts of the lots of which they appeared to form a part,—that is, the lots were assessed and these strips were parts of them, and these taxes seem to have been paid by the owners of the lots. It was proved by plaintiff that he paid the taxes on lots 37, 42 and 44 from 1882 to 1895, inclusive, and he gave in evidence tax receipts showing such payment, except for the years 1888 and 1892. The defendant company paid none of these taxes so assessed, but did pay seven per cent of its gross earnings under the provisions of its charter, which it claims included all taxes which were or could be lawfully assessed against the property.

The charter of defendant in error (Laws of 1851, p. 61,) provides in section 3 that it "shall have the right of way

upon, and may appropriate to its sole uses and control, land not exceeding two hundred feet in width through its entire length." Section 14 provides that it shall cause to be made "maps of the parts thereof located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds in the county in which said parts of said road and branches shall lie." Section 18 provides: "In consideration for the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches for the six months then next preceding." Section 22 provides: "After the expiration of six years the stock, property and assets belonging to said company shall be listed by the president, secretary or other officer with the Auditor of the State, and an annual tax for State purposes shall be assessed by the Auditor upon all the property and assets of every name, kind and description belonging to said corporation. * * * The said corporation is hereby exempted from all taxation of every kind, except as herein provided for. * * * The said five per cent of gross or total proceeds, receipts or income aforesaid shall be paid into the State treasury in money, and applied to the payment of interest-paying State indebtedness, until the extinction thereof: *Provided*, in case the five per cent provided to be paid into the State treasury, and the State taxes to be paid by the corporation, do not amount to seven per cent of the gross or total proceeds, receipts or income, then the said company shall pay into the State treasury the difference, so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation."

The right of way of the defendant company was by its charter, which had the force of a contract with the State,

exempt from all taxation except for State purposes. (*Neustadt v. Illinois Central Railroad Co.* 31 Ill. 484.) If the property had been exempt from taxation altogether, then the defendant's possession, which began as to one piece of the land in 1882 and as to the others in 1885, could only have become available, as against the plaintiff, after the lapse of twenty years, for if there were no taxes to pay because of such exemption the seven years' statute would have no application. *Wisner v. Chamberlin*, 117 Ill. 568.

Plaintiff claims that defendant paid no taxes during the ten or more years it was in possession, but paid only the seven per cent of its gross earnings under its contract with the State, which contract exempted its property from taxation. If the property in question was a part of the company's right of way it was exempt from all but State taxes. But it had ceased to be a part of such right of way, and had become the private property of plaintiff and was liable to assessment for taxes generally as other private property, and it was, as we have seen, assessed for taxes as parts of the lots to which it was attached, and plaintiff, and not defendant, paid these taxes. It is difficult, therefore, to see how it can be maintained, under the evidence, that the defendant paid "all taxes legally assessed against such lands" during any seven years while it was in possession. Outside of the mere fact that the company continued to pay, as it had theretofore done, the percentage of its gross earnings required by its contract with the State, there is no evidence that it paid any taxes on this property at all, and as these strips had ceased to belong to the company, the seven per cent, even if otherwise sufficient as payment of taxes, did not cover these strips. There were taxes which were legally assessed against it as the property of plaintiff, but the company did not pay them. Besides, we must regard it as a fatal objection to the defendant's claim of payment that there is no evidence in the record that these lands were ever listed with the Auditor of

State and that the Auditor assessed any tax against them, or against the company as their owner, as required by the charter. There is no evidence that any property of the company was listed with the Auditor and that it was assessed for State purposes. How, then, can it be judicially determined as a fact necessary to be affirmatively established, that defendant in error paid any such taxes? In order to bring itself within the seven years' statute of limitations it was incumbent on defendant to prove affirmatively that it had complied with the requirements of the statute, and not having done so in the respects mentioned it failed in its defense.

It is claimed, however, by defendant, that when plaintiff lost his possession he had no title under which he could become the aggressor and by ejectment oust defendant of its possession. This position is not tenable. As said in *McDuffee v. Sinnott*, 119 Ill. 449 (on p. 452): "It is now well settled in this State that whenever the bar of the statute has become absolute, and the party entitled is in possession under it, it is thereafter just as available for attacking as for defensive purposes, and its availability in this respect will not depend at all upon the occupant continuing in the actual possession of the property. His rights in that respect are precisely the same as those of any other absolute owner of land. He can vacate it or occupy it, just as convenience or interest may dictate." See, also, *Sholl v. German Coal Co.* 139 Ill. 21; *Illinois Central Railroad Co. v. Moore*, *supra*.

The circuit court erred in not finding the issues for the plaintiff and in rendering judgment for the defendant. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

THE TOWN OF DRUMMER *et al.*

v.

WILLIAM COX *et al.**Filed at Springfield April 3, 1897.*

1. STATUTES—*statutes conferring powers of taxation are strictly construed.* Statutes conferring the power of taxation upon municipal authorities must be strictly construed in determining the extent of the power conferred.

2. MUNICIPAL CORPORATIONS—*power to levy tax is not inherent in municipality.* A municipal corporation has no power to levy taxes other than as conferred by statute, and all its acts in that regard must conform to the grant of power.

3. SAME—*Township Organization act construed as to power of town to levy taxes.* Neither clause 1 nor clause 3 of section 3, article 4, of the Township Organization act, (Rev. Stat. 1874, p. 1071,) confers on the electors present at a town meeting power to levy a tax to raise money for deepening and straightening a natural water-course running through the town.

4. INJUNCTION—*scope of injunction against extending and collecting tax.* An injunction against the extension and collection of a tax because of want of power in the municipality to make the levy, also prohibits the use by the town of a portion of the tax collected.

APPEAL from the Circuit Court of Ford county; the Hon. ALFRED SAMPLE, Judge, presiding.

J. H. MOFFETT & MCQUISTON, for appellants:

Town taxes may be levied for purposes in which the public generally are directly interested, such as constructing or repairing roads, bridges or causeways within the town. *Greenwood v. Town of LaSalle*, 137 Ill. 225; *Freeport v. Supervisors*, 41 id. 495; *Drake v. Phillips*, 40 id. 388.

When the exclusive jurisdiction and power to legislate upon a given subject have been conferred by law upon a municipal corporation, every intendment and presumption ought to be made to support its acts. *Stanton v. Chicago*, 154 Ill. 23; *Harmon v. Chicago*, 140 id. 374; *People v. Oregier*, 138 id. 414; *Mt. Carmel v. Shaw*, 155 id. 37; *Taylor v. Thompson*, 42 id. 9.

Any act done by a municipal body involving a subject matter upon which it is authorized to act, and which involves judgment or discretion, will not be reviewed by the courts unless the same will operate oppressively or is unreasonable or unjust. *Stephens v. Training School*, 144 Ill. 336; *O'Hare v. Railroad Co.* 139 id. 151; *Crawfordsville v. Braden*, 130 Ind. 149; *Bates v. Bassett*, 1 L. R. A. 166.

If it be made to appear that a tax has been voted and levied with an honest purpose to protect the general well-being of the municipality, and was not merely designed for the benefit of individuals or a class, its collection should not be stayed by the courts. *Railroad Co. v. Smith*, 62 Ill. 268; *Taylor v. Thompson*, 42 id. 9.

CLOUD & KERR, for appellees:

The power of municipal corporations to levy taxes is strictly construed. Any fair and reasonable doubt concerning the existence of the power is resolved against the corporation and the power denied. 2 Dillon on Mun. Corp. (4th ed.) sec. 763; Cooley on Taxation, 209; *Commissioners v. Newell*, 80 Ill. 587; *Hutchison v. Self*, 153 id. 542; *Webster v. People*, 98 id. 349; *Lott v. Ross*, 30 Ala. 156; *Savannah v. Hartridge*, 8 Ga. 23.

A town may exercise only such powers as are granted or which are necessarily implied. 2 Starr & Curtis' Stat. p. 2411, par. 39; *Drake v. Phillips*, 40 Ill. 388.

The legislature having prescribed the mode by which systems of drainage may be established, no other mode can be pursued. Drainage statutes; *Webster v. People*, 98 Ill. 349.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Prior to April 7, 1896, there had been some discussion in the town of Drummer, amongst its residents, as to straightening Drummer creek, a stream which runs in a general direction from north to south through the town.

On the last mentioned date, at a town meeting, a preamble and resolutions were adopted, in which it was recited: "It is deemed advisable for the interests of the town of Drummer, and for the protection of the roads and bridges within said town of Drummer, and the better drainage of said town of Drummer, that Drummer creek, in said town of Drummer, be straightened and deepened" between certain designated points. By a vote of the town meeting \$1000 was appropriated for that purpose, and the town clerk was directed to certify the same to the county clerk that it might be extended against the property within said town. That was done, and numerous property owners, appellees here, filed their bill to enjoin the extension by the county clerk of the tax or the collection of the same. A temporary injunction was ordered by the chancellor and the defendants answered. Numerous affidavits were filed and a motion was entered to dissolve the injunction, which was denied by the court, and the defendants prosecute this appeal and assign error in granting the injunction, and appellees, complainants below, assign a cross-error in not enjoining the use of the money collected.

It is objected there was no notice given that an appropriation would be sought to be made at that meeting, that the meeting was not held at the polling place, and that there was no power in the town to make the appropriation for these specific purposes.

A municipal corporation can only exercise such powers as are expressly granted, and all its acts must conform to the grant of power as to the amount and purpose specified. This principle is sustained by the uniform current of authority in this State. (*Drake v. Phillips*, 40 Ill. 388.) It is a principle of construction of a statute, that where power is granted to a municipal authority to levy a tax it must be construed strictly, and only such power can be exercised as is granted in clear and unmistakable terms. The power to levy a tax is not inherent in a municipality, and

can only be exercised when conferred, and in determining the extent to which conferred the rule of strict construction is necessarily followed. *Comrs. of Highways v. Newell*, 80 Ill. 587.

The authority granted to a township to provide for the levy of a tax at a town meeting is found in section 3, article 4, of the Township Organization act, and may be summarized as a grant of power to the electors present at the annual town meeting "to direct the raising of money by taxation for the following purposes: First, for constructing or repairing roads, bridges or causeways within the town to the extent allowed by law. * * * Third, for any other purpose required by law." Under this first clause the power to raise money by taxation for the construction or repairing of roads or bridges to the extent allowed by law is expressly limited by provisions of the statute, and the amount should not exceed the limitation. (*Town of Lemont v. Singer & Talcott Stone Co.* 98 Ill. 94.) Not only is that limitation fixed by the statute, but the grant of power for the construction or repairing of roads and bridges is not a grant of power to do what was recited in the preamble and resolutions adopted on April 7, 1896, at the town meeting, which was: "It is deemed advisable for * * * the better drainage of said town of Drummer that Drummer creek * * * be straightened and deepened." The first subdivision of section 3 is no authority from the legislature to the municipal authorities of a town to drain lands, or construct drains and ditches for the general benefit of the town or the owners of lands. The power to do this is granted in a different way under the drainage acts, and is not conferred on the town meeting. The power conferred by the Road and Bridge act on commissioners of highways to open a passage for waters to pass from the highway to any natural water-course, and to clean up ditches through lands for the purpose of carrying off waters from the highways, is not a grant of power to the

town meeting, and if it should be held that that grant would authorize the deepening and straightening of a natural water-course, still it is not within the power of the town meeting to so act. The levy of a tax for such purpose as that is left solely with the commissioners of highways of the town.

The power not being derived under the first subdivision of section 3 of chapter 139, it must then be considered whether it is derived under the third provision, which recites that the electors present at the annual town meeting shall have power to direct the raising of money by taxation for any other purpose required by law. There is no provision of the statute which confers a power on the town meeting to levy a sum, to be collected as a tax, for the purpose of straightening water-courses or deepening them, and the third provision confers no such power. The injunction was properly granted.

It is alleged, under the assignment of cross-errors, that the injunction should have gone further and prohibited the use of any money collected. The injunction against the extension and collection of the tax because of a want of power in the town meeting to levy the same also prohibited its levy and collection and the right to use the same.

The decree of the circuit court granting the injunction is affirmed.

Decree affirmed.

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